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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioner

versus

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the rate regulation of certain offerings of communications common carriers has historically been the exclusive prerogative of the states, with a federal regulatory agency created by Congress to exercise regulatory power in those areas that cannot be reached by state regulatory agencies, may the federal agency adopt a new policy of "non-regulation" of these offerings, and while declining to exercise its own jurisdiction, issue preemption orders that preclude the states from exercising their regulatory powers?*

* The following parties were petitioners in the consolidated proceedings before the court of appeals:

Computer & Communications Industry Association (No. 80-1471); The People of the State of California and the Public Utilities Commission of the State of California (No. 81-1193); Independent Data Communications Manufacturers Association, Inc. (No. 81-1217); National Association of Regulatory Utility Commissioners (No. 81-1222); American Newspaper Publishers Association (No. 81-1224); Datapoint Corporation (No. 81-1223); Motorola, Inc. (No. 81-1226); and U.S. Telephone and Telegraph Corporation (No. 81-1327).

The following parties were intervenors in the proceedings before the court of appeals:

Aeronautical Radio, Inc.; American Telephone & Telegraph Company; American Petroleum Institute; Association of Data Processing Service Organizations, Inc.; Bunker Ramo Corporation; Central Telephone & Utilities Corporation; Citicorp; Communications Satellite Corporation; Computer & Business Equipment Manufacturers Association; Comsat General Corporation; Continental Telephone Corporation;

(Footnote Continued)

Control Data Corporation; GTE Service Corporation; GTE Telenet Communications Corporation; Hazeltine Corporation; International Business Machines Corp.; ISA Communications Services, Inc.; Louisiana Public Service Commission; MCI Telecommunications Corporation; National Burglar & Fire Alarm Association, and Alarm Industry Telecommunications Committee; North American Telephone Association; RCA Global Communications, Inc.; Satellite Business Systems; Southern Pacific Communications Company; Sperry Univac Division of Sperry Corp.; Tymnet, Inc.; United Computing Systems, Inc.; United Telephone Systems, Inc.; Utilities Telecommunications Council; Western Union Telegraph Company; and Xerox Corporation.

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No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1982

**LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner**

VS.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

The Louisiana Public Service Commission, petitioner, hereby petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on November 12, 1982.

OPINIONS BELOW

The opinion of the court of appeals, which is reproduced in the Appendix commencing at page A-1, is reported as *Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982).

The ruling of the Federal Communications Commission, known as the *Computer II* decision, is set forth in three reported orders issued in the docket styled *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828 (F.C.C.). They are:

"Final Decision," 77 F.C.C. 2d 384 (1980);
"Memorandum Opinion and Order," 84 F.C.
C.2d 50 (1980); "Memorandum Opinion and
Order on Further Reconsideration," 88 F.C.
C.2d 512 (1981).

These orders are voluminous. Rather than reprint them in the Appendix, we have lodged a copy with the Clerk, subject to the requirement that the orders be reprinted if the Court directs.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered November 12, 1982. No application for rehearing was filed. This Court has jurisdiction to review the decision of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following statutes, set forth in the Appendix commencing at page A-48, are involved in this case:

47 U.S.C. § 152

47 U.S.C. § 203

47 U.S.C. § 221

STATEMENT OF THE CASE

1. Preliminary statement.

This case presents the issue of whether a federal agency may broadly preempt state regulatory power over the marketing of telecommunications equipment on the ground that the exercise of state power might interfere with a federal "policy" that is newly created by the agency, but neither embodied nor implied in any federal statute. The Federal Communications Commission ("FCC"), an agency created by Congress, determined that "competition" had arisen in the marketing of "customer premises equipment" and "enhanced services" by communications common carriers and others. Therefore, it decided that those offerings should no longer be regulated.

To implement its new policy, the FCC first determined that it had no duty to regulate customer premises equipment and enhanced services, either because its statutory jurisdiction did not encompass these offerings or because regulatory abstention is permissible under the statute. This decision in itself could not accomplish deregulation, however, because the states historically have set the rates for customer premises equipment that is used jointly for intrastate and interstate communications and the services performed by this equipment, pursuant to the division of authority envisioned in the Communications Act. Thus, to avoid any conflict with the agency-created federal "policy," all state power to tariff this equipment was preempted by the FCC.¹ This decision was affirmed by the United

¹ The decision of the FCC occurred in a rulemaking proceeding known as the "Second Computer Inquiry," or "Computer II." *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828

States Court of Appeals for the District of Columbia Circuit ("court of appeals").²

2. Course of proceedings in the FCC.

The rulemaking proceeding of the FCC, known as the "Second Computer Inquiry" or "Computer II," was instituted in 1976 to reexamine determinations made in the First Computer Inquiry and embodied in Rule 64.702 of the Rules of the FCC.³ The First Computer Inquiry established the definitional distinction between "communications" services and "data processing" services and implemented two regulatory principles: (1) the FCC would forbear from regulation of data processing services, and (2) carriers could not provide data processing services, except through a separate subsidiary.⁴ Computer II was assertedly required because of technological advances resulting in "a blurring of the distinctions between data processing and communications."⁵ The notice of inquiry set forth a suggested amendment to Rule 64.702 that would "positively" define data processing

(1 Continued)

(F.C.C.); "Final Decision," 77 F.C.C.2d 384 (hereinafter referred to as "Computer II Final Decision"); "Memorandum Opinion and Order," 84 F.C.C.2d 50 (1980) (hereinafter referred to as "Computer II Memorandum Opinion and Order"); "Memorandum Opinion and Order on Further Reconsideration," 88 F.C.C.2d 512 (1981) (hereinafter referred to as "Computer II Reconsideration Order").

2 *Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982).

3 47 C.F.R. 64.702.

4 See Notice of Inquiry and Proposed Rulemaking in Second Computer Inquiry, 61 F.C.C.2d 103, 108 (1976).

5 *Id.* at 105.

so as to eliminate ambiguities.⁶ Subsequent notices, and a tentative decision issued in 1979, indicated that the rule-making proceeding continued to examine the definitional demarcation between data processing and communications.⁷

In its Final Decision released May 2, 1980, the FCC abandoned its attempt to distinguish communications from data processing services.⁸ It decided to deregulate the provision of all enhanced services.⁹ In addition, the FCC determined that "customer-premises equipment," the equipment that receives and sends messages and may perform services on the customer's premises, such as an ordinary telephone, an office switchboard, or a sophisticated telecommunications receiver, should be freed from regulation.¹⁰ To accomplish this objective, state power to tariff this equipment was preempted.¹¹ This action was reaffirmed in the Memorandum Opinion and Order issued December 30, 1980.¹²

6 *Id.* at 108.

7 Supplemental Notice of Inquiry and Enlargement of Proposed Rule-making in Second Computer Inquiry, 64 F.C.C.2d 771 (1977). Tentative Decision and Further Notice of Inquiry and Rulemaking in Second Computer Inquiry, 72 F.C.C.2d 358 (1979).

8 Computer II Final Decision, 77 F.C.C.2d 384, 386-87 (1980).

9 *Id.*

10 *Id.* at 388, 455.

11 *Id.*

12 See Computer II Memorandum Opinion and Order, 84 F.C.C.2d 50, 103-05 (1980).

3. Regulatory context of the preemption decision.

The FCC forbearance from rate regulation of enhanced services and terminal equipment is not a significant departure from past practice as far as federal tariff regulation is concerned. The FCC has never established the tariffs for most enhanced services, nor have federal tariffs existed for most of the customer premises equipment provided to consumers by common carriers. The establishment of these rates has historically been the prerogative of state regulatory agencies.¹³

Much of the plant devoted to communications service in this country has both an intrastate and interstate use. Thus, a piece of customer premises equipment may be used primarily for intrastate calls in the local exchange and intrastate toll calls, but it may also be used for interstate toll calls. A similar joint use is made of the inside wiring on the customer's premises, the wiring that connects customers to switching facilities, the switching facilities, central office equipment, and other plant. Under the provisions of the Communications Act (47 U.S.C. §221(c)) and the decision of this Court in *Smith v. Illinois Bell Telephone Co.*,¹⁴ a fair apportionment is required of the costs attributable to each jurisdiction in order to fairly account for these costs.¹⁵ Over time, a separations process developed to accomplish this objective. Of the joint costs, which are apportioned in

13 As the FCC recognized, it has historically set rates only for customer premises equipment used exclusively for interstate communications. Computer II Memorandum Opinion and Order, 84 F.C.C. 2d at 66-67.

14 282 U.S. 133, 51 S.Ct. 65 (1930).

15 *Id.* at 148, 51 S.Ct. at 68.

part according to the use of the facilities, the majority have been assigned to the intrastate jurisdictions.¹⁶

While the costs associated with jointly used customer premises equipment are divided between the state and federal jurisdictions, the responsibility for tariffing this equipment has always rested with the state regulatory agencies. Thus, the FCC recognized that the only federal tariffs for customer premises equipment involve equipment used exclusively in "interstate or foreign communications"¹⁷ and that all customer premises equipment subject to the separations process is "tariffed at the state level."¹⁸ The costs assigned to the federal jurisdiction for this equipment and other jointly used plant historically have been recovered in interstate toll telephone rates, not in any federal tariffs for jointly used equipment or plant. The federal "regulation" of the jointly used equipment has included the adjustment and the quantification of these interstate costs in determining the proper level of toll rates, but has not involved the tariffing of the equipment.

The FCC in its Final Decision recognized that customer premises equipment is "used *predominantly* in intrastate communications."¹⁹ Nevertheless, the power to tariff this

16 Certain issues relating to the separations process are discussed by the Louisiana Supreme Court in *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 352 So.2d 964, 981-85 (La. 1977). See also Computer II Memorandum Opinion and Order, 84 F.C.C.2d at 66.

17 Computer II Memorandum Opinion and Order, 84 F.C.C.2d at 67.

18 *Id.* at 66.

19 Computer II Final Decision, 77 F.C.C.2d at 456.

equipment was preempted. The FCC noted that the states "may no longer be able to regulate, as they have in the past, the charges for [customer premises] equipment used jointly in the provision of intrastate and interstate services."²⁰ The decision thus has the effect of rendering " 'meaningless' the jurisdiction of the State to establish charges for intrastate use of facilities"²¹

4. Grounds cited as supporting the decision to prohibit rate regulation of customer premises equipment by the states.

Historically, communications common carriers have operated under the discipline of state regulatory commissions. These agencies have granted "natural monopoly" status to these companies and the assurance of a "fair" return on investment, permitting the carriers to acquire substantial economic power over time. Simultaneously, state regulatory agencies exercise the power to protect consumers through the ratemaking process. As Professor Priest indicates in his treatise, "[every] state has . . . established a regulatory agency" and "the early predicates for regulation were developed under the guidance of state tribunals."²² The ratemaking process is designed to set utility prices at a level that will allow only a fair rate of return to the utility.²³ The overriding principle is the "protection of the public interest."²⁴

²⁰ *Id.* at 455.

²¹ *Id.* at 457.

²² 1 A. Priest, *Principles of Public Utility Regulation* 25 (1969).

²³ *Id.* at 191 *et seq.*

²⁴ *Id.* at 193.

The decision to preempt state ratemaking authority was based largely on the determination of the FCC that the possible emergence of "competition" in markets for customer premises equipment *might* provide an adequate substitute for regulation. The FCC did not determine that competition exists in these markets. Instead, it prognosticated that competitive markets may develop. Thus, the FCC stated that "terminal equipment [customer premises equipment] markets can be workably competitive so long as restraints on competition are not tolerated,"²⁵ there are "likely competitive trends in the terminal equipment market,"²⁶ the market has "competitive potential,"²⁷ and the market "is subject to an increasing amount of competition"²⁸ These and similar comments were the basis for forbidding the rate regulation of customer premises equipment throughout the United States.

The conclusions of the FCC as to the possible competitive nature of the terminal equipment market are sharply contradicted by its own analysis relating to the requirement that the American Telephone & Telegraph Company ("AT&T") provide customer premises equipment through a separate subsidiary. As an indication of the power of AT&T, the FCC found that the Bell System receives more than eighty-one per cent of the total telephone revenue in the United States.²⁹ These receipts are about ten times

25 Computer II Final Decision, 77 F.C.C.2d at 454.

26 *Id.* at 454-55.

27 *Id.* at 440.

28 *Id.* at 439

29 Computer II Final Decision, 77 F.C.C.2d at 471.

the revenues of the second place company, General Telephone & Electronics Corporation ("GTE"), and more than thirty times larger than the revenues of any other telephone company.³⁰

The Bell System and GTE were subjected to structural separation because they have "sufficient market power to engage in anti-competitive activity on a national scale . . .,"³¹ though the separation requirement was later removed from GTE.³² Other firms offering terminal equipment and enhanced services are not operating nationwide because the markets are "infant yet promising . . ."³³ Only two telephone companies, the Bell System and GTE, "have basic manufacturing operations producing large quantities of a wide range of telephone equipment."³⁴ On a national scale these companies have "substantial market positions, if not market power, in the provision of certain kinds of [customer premises equipment]."³⁵

On a local level, the FCC determined that the Bell System and GTE have monopoly status. It referred to their "local monopoly positions [providing] the opportunity (without maximum separation) to engage in . . . anticompetitive conduct . . ."³⁶ As the FCC stated, "[t]he importance

30 *Id.*

31 *Id.* at 469.

32 Computer II Memorandum Opinion and Order, 84 F.C.C.2d at 72.

33 Computer II Final Decision, 77 F.C.C.2d at 467.

34 *Id.* at 473.

35 *Id.* at 467.

36 *Id.* at 473.

of the control of local facilities, as well as their location and number, cannot be overstated."³⁷

The convincing demonstration by the FCC of the dominant position of the Bell System did not occur in the context of an analysis of the potential impact on consumers of the deregulation decision. Instead, this discussion was deemed relevant only to the structural determinations necessary to properly handicap the future participants in the customer premises equipment market. However, the discussion shows that customer premises equipment will not be available in the near future in a true "competitive market." Instead, this equipment will be provided by "carriers having significant market power and the ability to exercise it to the detriment of the communications ratepayer" ³⁸ The FCC did not attempt to determine the extent to which "competition" has emerged in local markets in different states throughout the country.

5. Decisions of the FCC and the court of appeals.

The decision of the FCC reflects a determination that (1) it need not exercise regulatory jurisdiction over customer premises equipment and (2) it can preclude the states from doing so. On the first issue, the FCC held that enhanced services are outside its jurisdiction under Title II of the Communications Act.³⁹ Thus, they cannot be regulated at the federal level. In addition, it found that it has " 'permissive authority' " over customer premises equipment and that

³⁷ *Id.* at 468.

³⁸ *Id.* at 486.

³⁹ Computer II Memorandum Opinion and Order, 84 F.C.C.2d at 89-90.

"the Act does not mandate its regulation."⁴⁰ Therefore, the "forbearance from its regulation" assertedly is not unlawful.⁴¹ On the preemption issue, the FCC held that its "authority over terminal equipment"⁴² was sufficient to require the states to adhere to the forbearance from regulation. Thus, the FCC found that under the preemption doctrine, it could abstain from exercising jurisdiction and at the same time preclude the states from exercising their regulatory authority.

The court of appeals held that the FCC was correct in finding that customer premises equipment "is not within the scope of Title II" of the Communications Act.⁴³ Therefore, it sustained the decision "not to subject enhanced services or CPE to Title II regulation"⁴⁴ However, the court found that the FCC could exercise "ancillary" jurisdiction to require that customer premises equipment be detariffed.⁴⁵ This exercise of " 'elastic' " power was deemed necessary to accommodate " 'dynamic new developments in the field of communications' " and eliminate any need for

40 *Id.* at 99, 100.

41 *Id.* at 99.

42 *Id.* at 103.

43 *Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198, 209 D. C. Cir. (1982) ("Computer II Court of Appeals Decision.")

44 *Id.* at 209.

45 *Id.* at 211.

“ ‘repetitive’ ” authorizing legislation from Congress.⁴⁶ The court affirmed the preemption of state power, summarizing its decision as follows:

We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that the policy favoring regulation by marketplace forces embodied in Computer II is neither arbitrary, capricious nor an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.⁴⁷

6. Impact of the antitrust settlement between the United States Department of Justice and AT&T.

In 1982, the United States Department of Justice and AT&T announced a settlement of the antitrust suit that was pending against the company. This settlement, as approved by the district court in which the case was pending, requires the divestiture by AT&T of the operating companies in the Bell System.⁴⁸ AT&T will be permitted to market customer premises equipment, as will the operating companies.

The antitrust settlement does not attempt to preempt state ratemaking power. If the states choose to regulate the marketing of customer premises equipment by the companies formerly comprising the Bell System and by other communications common carriers, they are prevented from

⁴⁶ *Id.* at 213, citing *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971).

⁴⁷ 693 F.2d at 217.

⁴⁸ *United States v. Western Electric Co.*, 1982-2 Trade Cas. (CCH) ¶64,900 (D.D.C. 1982).

doing so only by the Computer II decision. Thus, the preemption issue is fully presented in the context of this case.

REASONS FOR GRANTING THE WRIT

The Court should issue a writ of certiorari to determine whether a federal administrative agency may engage in "self-starting" preemption, in which traditional regulatory laws of the states are eviscerated to further a new agency "policy" that is beyond the explicit or implicit reach of any federal statute and contrary to the longstanding division of federal and state regulatory responsibilities. This issue arises in the context of a decision that attempts a drastic reordering of federal-state relations.

The ruling of the FCC and the court of appeals would prevent the states from setting rates for equipment that is used primarily in the intrastate jurisdictions, for which costs have been recovered primarily in the intrastate jurisdictions, and for which rates have been established exclusively in the intrastate jurisdictions. It precludes the determination by the states of the proper regulatory methods of protecting consumers in light of local conditions, including local determinations regarding the extent to which "competition" will curb the abuse of monopoly power. Though the states for decades have permitted the growth of "natural monopolies" in the communications industry only because they could also assure the fairness of rates through the regulatory process, this check on the power of communications providers is now eliminated.

The decision should be reviewed because it runs counter to the prior decisions of this Court. According to the court of appeals, preemption by an administrative agency is proper so long as Congress contemplated that the agency might

make up an unspecified new policy and the new policy is neither "arbitrary, capricious, nor an abuse of discretion."⁴⁹ The preemption of state power to accomplish the new policy is deemed valid without further inquiry.⁵⁰ This approach runs counter to precedents restricting the exercise of the preemption power through the requirement that the preemption be necessary to further a policy adopted by Congress.⁵¹

Furthermore, the decision of the court of appeals requires review because the statutes enacted by Congress show an explicit intention to reserve regulatory autonomy to the states. Indeed, specific provisions of the Communications Act were drafted to prevent the FCC from interfering with ratemaking prerogatives of the states. Prior to the Computer II decision, the federal-state application of the Congressional directive resulted in ratemaking autonomy for the states and the limitation of FCC ratemaking activities to the interstate realm. The departure from this division of power by an administrative agency, through the device of ignoring Congressional intent, should be subject to the review of this Court.

49 Computer II Court of Appeals Decision, 693 F.2d at 217.

50 *Id.*

51 *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210 (1963); *State of North Carolina v. United States*, 325 U.S. 507, 65 S.Ct. 1260 (1945).

I. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER PREEMPTION BY A FEDERAL AGENCY IS PERMISSIBLE TO FURTHER POLICIES NOT MANDATED BY STATUTE, BUT WHOLLY CREATED BY THE AGENCY.

The decision of the court of appeals recognized that the deregulation ruling of the FCC was a departure from principles set forth in the Communications Act. Indeed, a primary issue reviewed by the court of appeals was whether this new approach is so inconsistent with the law as to be impermissible in itself.⁵² The FCC determined *not* to exercise the regulatory authority granted by statute, but instead to adopt a wholly new approach based on its asserted ancillary jurisdiction.⁵³ This approach included (a) forbearance from the cost-determination regulation previously exercised by the FCC; (b) the imposition of certain structural requirements on AT&T; and (c) the prohibition of traditional rate regulation of customer premises equipment and enhanced services by the states. The policy to be furthered, the deregulation of certain activities of common carriers, is not even remotely suggested as a goal of the Communications Act.⁵⁴ It was wholly created by the FCC.

This self-generating determination of federal policy by an administrative agency presents special problems when the fulfillment of the policy requires wholesale preemption of state authority. It is one thing for the court of appeals

52 Computer II Court of Appeals Decision, 693 F.2d 198, 209.

53 *Id.* at 211-12.

54 See 47 U.S.C. §§201-222.

to hold that an agency has discretion to abstain from performing the duties outlined in a statute;⁵⁵ it is another to conclude that this agency's reversal of Congressional policy can also be imposed by the agency on the states. Yet the court of appeals affirmed the decision of the FCC on the ground that the agency policy was permissible under the statute and was not otherwise "arbitrary, capricious [or] an abuse of discretion."⁵⁶ This standard for the review of preemption actions taken to fulfill a self-generated agency policy runs counter to the decisions of this Court indicating that an express or implied Congressional directive is necessary for the preemption of state law. Therefore, a writ should be issued to review the decision.

Although Congress generally has the power to preempt state law pursuant to the Commerce Clause⁵⁷ and the Supremacy Clause⁵⁸ of the United States Constitution, considerations of federalism embodied in the Tenth Amendment have led the Court to require a clear showing that Congress intended preemption before invalidating state law. Thus, federal regulations are not deemed preemptive unless Congress unmistakably ordains this result.⁵⁹ Before preemption by an administrative agency will be approved, the agency must show that each element of its action furthers a Congressional objective.⁶⁰ This standard was not met by the

55 693 F.2d at 210-11.

56 *Id.* at 217.

57 U.S. Const. art. I, §8, cl. 3.

58 U.S. Const. art. VI, cl. 2.

59 *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47, 83 S.Ct. 1210, 1219 (1963).

60 *State of North Carolina v. United States*, 325 U.S. 507, 65 S.Ct. 1260 (1945).

FCC, nor was it applied by the court of appeals.

In *Florida Lime and Avocado Growers, Inc. v. Paul*,⁶¹ this Court reviewed a claim that federal standards applicable to the marketing of avocados should be deemed preemptive of inconsistent regulations in California. The Court held that preemption does not occur unless (1) the nature of the regulated subject matter permits no conclusion except that Congress intended preemption, or (2) in explicit terms, the "Congress has unmistakably so ordained."⁶²

Paul held that the nature of the subject matter did not make preemption inevitable, since avocado regulation was "not a subject by its very nature admitting only of national supervision,"⁶³ nor "a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests"⁶⁴ The Court observed: "On the contrary, the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence."⁶⁵

On the question of Congressional purpose, the Court in *Paul* applied the rule requiring an unambiguous Congressional mandate. It stated:

The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic

61 373 U.S. 132, 83 S.Ct. 1210 (1963).

62 373 U.S. at 142, 83 S.Ct. at 1217 (citation omitted).

63 *Id.* at 143, 83 S.Ct. at 1218 (citation omitted).

64 *Id.* at 144, 83 S.Ct. at 1218 (citation omitted).

65 *Id.*

police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress" In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate.⁶⁶

Thus, preemption should not be decreed unless the subject matter is a type permitting only national regulation or Congress has unmistakably decreed this result.

When a federal administrative agency takes an action resulting in the preemption of state law, the action can only be valid if it satisfies the prerequisites for the exercise of preemptive power by Congress. The power of administrative agencies is derived from statutes and the basis for the power to preempt must be provided by Congress.⁶⁷ In addition, the administrative agency is required to demonstrate conclusively that its actions further objectives mandated by Congress. Thus, in *State of North Carolina v. United States*,⁶⁸ which involved the Interstate Commerce Act, the Court overruled a decision of the Interstate Commerce Commission to supplant a state rate where it was not clearly shown that the decision furthered the purpose of the Con-

66 373 U.S. at 146, 83 S.Ct. at 1219 (citation omitted).

67 *State of North Carolina v. United States*, 325 U.S. 507, 65 S.Ct. 1260 (1945).

68 325 U.S. 507, 65 S.Ct. 1260 (1945).

gressional legislation.⁶⁹ The Court stated:

A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty." . . . Before the Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appear." . . . And the intention to interfere with the state's ratemaking function is not to be presumed . . . , nor must its intention in this respect be left in serious doubt. . . . The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. . . .⁷⁰

These authorities establish that preemptive intent must flow from Congress. Moreover, the intent is not easily inferred, but must be unmistakably ordained in the Congressional directive. Furthermore, when an administrative agency attempts preemption, it must provide clear findings linking each element of its action to the asserted Congressional authorization.

These standards have not been met in this case. Applying

69 325 U.S. at 510-11, 65 S.Ct. at 1263.

70 *Id.* at 511, 65 S.Ct. at 1263 (citations omitted).

an "arbitrary, capricious [or] an abuse of discretion"⁷¹ test, the court of appeals approved a wholesale preemption order designed not by Congress to further a policy mandated by it, but by an administrative agency to replace that agency's statutory duties. Because the decision runs counter to the principles historically applied by this Court, a writ of certiorari should issue to review it.

II. THE COURT SHOULD ISSUE A WRIT TO DETERMINE WHETHER AGENCY PRE-EMPTION IS PROPER IN THE FACE OF CONGRESSIONAL DIRECTIVES GRANTING AUTONOMY TO THE STATES IN THE AREA SUBJECT TO THE PREEMPTIVE ACTION.

The preemption of state power to tariff customer premises equipment and enhanced services is contrary to the language and intent of the Communications Act, which reserves this authority to the states. In addition, this action runs counter to the allocation of regulatory responsibility that has prevailed for half a century pursuant to the directives contained in the Act and a leading decision of this Court.⁷² Therefore, a writ should issue to review the decision.

Section 152 of the Communications Act gives the FCC jurisdiction over "all interstate . . . communication by wire or radio . . ."⁷³ However, this section excludes FCC jurisdiction over intrastate communications. Section

71 Computer II Court of Appeals Decision, 693 F.2d at 217.

72 *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 149, 51 S.Ct. 65, 69 (1930).

73 47 U.S.C. §152(a).

152(b) states in part:

[S]ubject to the provision of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intra-state communication service by wire or radio of any carrier⁷⁴

In addition, Section 221(b) excludes from the jurisdiction of the FCC the power to set rates for jointly used equipment if the equipment is regulated by a state commission or other local authority. It provides:

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to . . . wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.⁷⁵

These provisions establish the Congressional intention to preserve state ratemaking authority over jointly used terminal equipment. This view is also supported by the legislative

⁷⁴ 47 U.S.C. § 152(b).

⁷⁵ 47 U.S.C. § 221(b).

history of the Act. In enacting the Act, Congress denied the FCC the kind of jurisdiction over local rates that had been exercised by the Interstate Commerce Commission in a transportation context in the *Shreveport Rate Case*.⁷⁶ Under the "Shreveport doctrine," the ICC was permitted to suspend an intrastate rate in order to correct an alleged discriminatory relationship between interstate and intrastate rates.⁷⁷

Section 221 (b) was included in the law at the suggestion of state regulators who were fearful that, in the absence of this language, the FCC might have the power to "override and interfere with State regulations."⁷⁸ Rep. Rayburn, who introduced the bill in the House of Representatives, said that Section 221 (b) "leaves local exchange service to local regulators even where a portion of such local exchange service constitutes interstate communications."⁷⁹

The statutory provisions reserving ratemaking power over jointly used equipment to the states are also consistent with other provisions of the Communications Act and the practical division of power existing for the past five decades. Congress intended that the states set rates for intrastate services

76 *Houston, East & West Texas Railway v. United States*, 234 U.S. 342, 34 S.Ct. 833 (1914). This interpretation of the legislative history was endorsed even in *North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036 (4th Cir. 1977), which adopted a restrictive interpretation of the limitation embodied in §221(b).

77 *North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036, 1047 (4th Cir. 1977).

78 Statement of Sen. Dill, Chairman of the Senate Committee, *Hearings on S.2910 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 156 (1934).

79 78 Cong. Rec. 10314 (1934).

and for all equipment used jointly for intrastate and interstate purposes and this power has traditionally been exercised by the states. The FCC, on the other hand, was given rate-setting power over interstate communications services – meaning long distance calls and messages.⁸⁰ Thus, the FCC was granted authority only to establish rates “for interstate and foreign wire or radio communication between . . . different points”⁸¹

In allocating this limited tariffing responsibility to the FCC, Congress was aware that most communications plant is jointly used for intrastate and interstate messages. Although it left to the states the power to tariff this equipment, Congress did provide for a fair division of the costs associated with this plant between the jurisdictions.

Thus, Section 221(c) of the Communications Act provides for the separation of “interstate” plant for the purpose of establishing the regulatory authority of the FCC. It states:

For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service.⁸²

Pursuant to this provision, a process for “separating” costs

80 47 U.S.C. §§152(a) & (b), 203, and 221 (b) & (c).

81 47 U.S.C. §203(a).

82 47 U.S.C. §221(c).

arose and has been in use for decades.⁸³ The costs assigned to the federal jurisdiction are recovered in interstate toll rates. The costs assigned to the states have been recovered in the rates for customer premises equipment and other services. The provision for the division of costs among the jurisdictions implements the decision of this Court in *Smith v. Illinois Bell Telephone Co.*,⁸⁴ which requires a fair division of costs.

The provision for the separation of jointly used plant establishes that Congress was well aware that the local plant of telephone companies was partially used for interstate communications. This local plant was rate regulated by the state commissions, except for the rates applicable to interstate toll services, and Congress intended that this approach continue. Congress in Section 203 authorized the FCC to provide tariffs for interstate communications services,⁸⁵ thereby filling the regulatory void resulting from the jurisdictional limits applicable to state agencies. Congress did *not* grant power to the FCC over tariffs for intrastate services, including the various components of basic local exchange service. This authority was reserved to the states and was not threatened for nearly half a century, prior to the adoption of the *Computer II* decision.

The specific language of the Communications Act, its legislative history, the overall plan it embodies for the apportionment of regulatory responsibilities in the federal system,

83 See NARUC-FCC Separations Manual.

84 282 U.S. 133, 149, 51 S.Ct. 65, 69 (1930).

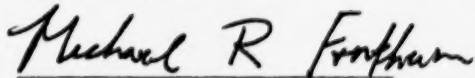
85 47 U.S.C. § 203.

and its implementation since 1934, establish the Congressional intent to reserve to the states ratemaking authority over jointly used customer premises equipment. No change in this approach has been decreed by Congress. Therefore, a writ of certiorari should be issued to determine whether agency preemption is proper in the face of a Congressional directive preserving the autonomy of the states in the area that the agency seeks to preempt.

CONCLUSION

This case involves a drastic reordering of federal-state regulatory prerogatives. The preemptive action of the FCC was taken to implement a new policy not created by Congress, but fashioned by the agency without any explicit or implicit Congressional directive. In addition, the intrusion into an area traditionally occupied by the states runs counter to the provisions of the Communications Act. A writ should be issued to determine whether preemption is proper to implement a self-generated plan of an administrative agency where Congress has granted autonomy to the states in the area that is the subject of the preemptive action.

Respectfully submitted,



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1471

**COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION,
PETITIONER**

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS**

**NORTH AMERICAN TELEPHONE ASSOCIATION,
UTILITIES TELECOMMUNICATIONS COUNCIL,
TYMNET, INC.,
CONTINENTAL TELEPHONE CORPORATION,
XEROX CORPORATION,
HAZELTINE CORPORATION,
ALARM INDUSTRY TELECOMMUNICATIONS COMMITTEE OF
THE NATIONAL BURGLAR & FIRE ALARM ASSOCIATION,
RCA GLOBAL COMMUNICATIONS, INC.,
SATELLITE BUSINESS SYSTEMS,
MOTOROLA, INC.,
U.S. TELEPHONE & TELEGRAPH CORPORATION,
AMERICAN PETROLEUM INSTITUTE,
CITICORP,
CENTRAL TELEPHONE & UTILITIES CORPORATION,
COMSAT GENERAL CORPORATION,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
GTE SERVICE CORPORATION,**

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

SPERRY UNIVAC DIVISION OF SPERRY CORPORATION,
COMMUNICATIONS SATELLITE CORPORATION,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
AMERICAN TELEPHONE & TELEGRAPH COMPANY,
COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS
ASSOCIATION,
CONTROL DATA CORPORATION,
UNITED TELEPHONE SYSTEM, INC.,
UNITED COMPUTING SYSTEMS, INC.,
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
WESTERN UNION TELEGRAPH COMPANY,
AERONAUTICAL RADIO, INC.,
ISA COMMUNICATIONS SERVICES, INC.,
INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS
ASSOCIATION, INC.,
ASSOCIATION OF DATA PROCESSING SERVICE
ORGANIZATIONS, INC.,
BUNKER RAMO CORPORATION,
GTE TELENET COMMUNICATIONS CORPORATION,
MUNICIPALITY OF ANCHORAGE d/b/a ANCHORAGE
TELEPHONE UTILITY,
LOUISIANA PUBLIC SERVICE COMMISSION, INTERVENORS

No. 81-1193

THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

No. 81-1217

INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS
ASSOCIATION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

No. 81-1222

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

No. 81-1223

DATAPoint CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

No. 81-1224

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

No. 81-1226

MOTOROLA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS
INTERNATIONAL BUSINESS MACHINES CORP., *et al.*,
INTERVENORS

Petitions for Review of Orders
of the Federal Communications Commission

Argued March 22, 1982

Decided November 12, 1982

Judgment entered
this date

*John H. Chapman and Herbert E. Marks, with whom
Laurel R. Bergold, Bernard M. Beerman, Brian E. Moran,
and Daniel A. Huber were on the joint briefs, for peti-
tioners Computer and Communications Industry Associa-
tion and Independent Data Communications Manufac-*

turers Association, Inc., and intervenors Association of Data Processing Service Organizations, Inc., Alarm Industry Telecommunications Committee of the National Burglar & Fire Alarm Association, and Southern Pacific Communications Company.

Deborah A. Dupont, Deputy Assistant General Counsel, National Association of Regulatory Utility Commissioners (NARUC), with whom *Charles D. Gray*, Assistant General Counsel, NARUC, *Janice E. Kerr*, *J. Calvin Simpson*, and *Gretchen Dumas*, Attorneys, Public Utilities Commission of the State of California, and *Michael R. Fontham* were on the briefs, for petitioners NARUC, State of California, and Public Utilities Commission of the State of California, and for intervenor Louisiana Public Service Commission.

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N. Frank Wiggins, with whom *Edwin B. Spievack*, *David M. Rickless*, and *Victor J. Toth* were on the brief, for intervenors North American Telephone Association (NATA) and Wisconsin Telecommunications Contractors Association (WTCA). *Ian D. Volner* also entered an appearance for NATA and WTCA.

James H. Laskey, Attorney, U.S. Department of Justice, with whom *Barry Grossman*, Attorney, U.S. Department of Justice, was on the brief, for respondent USA.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission (FCC), with whom *Stephen A. Sharp*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, *Jane E. Mago*, and *Michael D. Sullivan*, Counsel, FCC, were on the brief, for respondent FCC. *Jack David Smith*, Counsel, FCC, also entered an appearance for respondent FCC.

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J. Roger Wollenberg, with whom *David R. Anderson*, *William T. Lake*, *Roger M. Witten*, *Jane Tucker Dana*, and *Jonathan Becker* were on the brief, for intervenor IBM Corporation.

James R. Hobson was on the brief for intervenors GTE Service Corporation and GTE Telenet Communications Corporation. *Philip M. Walker*, *Donald E. Ward*, *William R. Malone*, and *Richard McKenna* also entered appearances for intervenor GTE Telenet Communications Corporation.

Joseph P. Markoski was on the brief for intervenor Honeywell, Inc. *Thomas J. Gallagher* also entered an appearance for Honeywell, Inc.

Arthur B. Sackler was on the brief for intervenor National Newspaper Association.

Bernard M. Beerman and *Brian E. Moran* were on the brief for intervenor Alarm Industry Telecommunica-

tions Committee of the National Burglar & Fire Alarm Association (AITC).

Stephen R. Bell entered an appearance for intervenor Tymnet, Inc.

Charles M. Meehan and *Shirley S. Fujimoto* entered appearances for intervenor Utilities Telecommunications Council.

Thomas L. Jones and *John Wohlstetter* entered appearances for intervenor Continental Telephone Corporation.

John R. Murphy and *Lawrence W. Secrist, III*, entered appearances for intervenor Xerox Corporation.

Lawrence M. DeVore entered an appearance for intervenor Communications Satellite Corporation.

John B. Gantt entered an appearance for intervenor COMSAT General Corporation.

Alan Raywid entered an appearance for intervenor Sperry Univac Division of Sperry Corporation.

Victor E. Ferrall, Jr., and *Linda K. Smith* entered appearances for intervenors Control Data Corporation and Hazeltine Corporation.

John M. Lathschuetz, *Carolyn C. Hill*, and *John W. Hunter* entered appearances for intervenor United Computing Systems, Inc. and United Telephone Systems, Inc.

John V. Kenny entered an appearance for intervenor Southern Pacific Communications Company.

Joel Yohalem entered an appearance for intervenor Western Union Telegraph Company.

John L. Bartlett entered an appearance for intervenor Aeronautical Radio, Inc.

Norman P. Leventhal entered an appearance for intervenor ISA Communications Services, Inc.

Tedson J. Meyers, Michael W. Faber, and Robert J. Miller entered appearances for intervenors Bunker Ramo Corporation and Citicorp.

Michael L. Glaser, Kathy J. Bible, and Francis E. Fletcher, Jr., entered appearances for intervenor Municipality of Anchorage d/b/a Anchorage Telephone Utility.

Theodore D. Frank entered an appearance for intervenor Central Telephone & Utilities Corporation.

Wayne V. Black, Larry S. Solomon, Stark Ritchie, and David E. Lindgren entered appearances for intervenor American Petroleum Institute.

John A. Ligon entered an appearance for intervenor U.S. Telephone & Telegraph Corporation.

William D. English, Harold David Cohen, and Jack N. Goodman entered appearances for intervenor Satellite Business System.

Alexander P. Humphrey, IV, entered an appearance for intervenor RCA Global Communications, Inc.

William J. Byrnes, John M. Pelkey, and Ruth S. Baker Battist entered appearances for intervenor MCI Telecommunications Corporation.

Stephen M. Feldman entered an appearance for intervenor American Business, Press, Inc.

Nathan M. Norton, Jr., Chairman, Arkansas Public Service Commission, was on the brief for *amicus curiae* State of Arkansas, urging that the FCC's decision be set aside.

Philip J. Mause, Norman A. Pedersen, and Steven M. Schur were on the brief for *amicus curiae* The Public Service Commission of Wisconsin, urging that the FCC's decision be set aside.

Horace S. Libby and *David Moskovitz* were on the brief for *amicus curiae* The Maine Public Utilities Commission, urging that the FCC's decision be set aside.

Carl L. Evans, *Stanley W. Foy*, and *Gary A. Tomlin* were on the brief for *amicus curiae* Alabama Public Service Commission, urging that the FCC's order be reversed and remanded with instructions.

Henry Geller was on the brief for *amicus curiae* Henry Geller, urging affirmance.

Warren Spannaus, Attorney General of the State of Minnesota, was on the statement in lieu of brief for *amicus curiae* Department of Public Service of the State of Minnesota, urging that the FCC's decision be set aside.

Evan Wilner and *Sandra Minch Hodes* were on the statement in lieu of brief for *amicus curiae* Office of People's Counsel of Maryland, urging that the FCC's decision be set aside.

Donald A. Law, Assistant General Counsel for the State of Kansas, was on the brief for *amicus curiae* The State Corporation Commission of the State of Kansas, urging that the FCC's decision be set aside.

William B. Gundling and *Robert S. Golden, Jr.*, Assistant Attorneys General for the State of Connecticut, were on the statement in lieu of brief for *amicus curiae* Department of Public Utility Control of the State of Connecticut, urging that the FCC's decision be set aside.

Before TAMM and EDWARDS,* *Circuit Judges*, and JAMES F. GORDON,** *U.S. Senior District Judge* for the Western District of Kentucky.

Opinion for the court filed by *Circuit Judge TAMM*.

* Circuit Judge Edwards did not participate in the disposition of this case.

** Sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

TAMM, *Circuit Judge*: This is a review of a Federal Communications Commission (Commission) rulemaking proceeding known throughout the telecommunications industry as the *Second Computer Inquiry* or simply *Computer II*.¹ Responding to monumental changes in the technological and economic conditions of the communications marketplace, the Commission in *Computer II* overhauled the regulatory regime governing the interrelationship of telecommunications and data processing. Eight petitioners and scores of intervenors challenge the Commission's new rules on myriad grounds. In our view, the Commission's action in adopting these rules was neither arbitrary nor capricious, nor did it constitute an abuse of discretion. We are convinced that the regulatory scheme established in *Computer II* is a reasonable one within the scope of the Commission's authority under the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976) (the Act). Accordingly, we affirm the Commission's decision in its entirety.

I. BACKGROUND

The FCC first addressed the regulatory and policy problems posed by the growing interdependence of com-

¹ The Federal Communications Commission (Commission) orders comprising the *Computer II* decision are as follows: Final Decision, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (*Computer II Final Decision*); Memorandum Opinion and Order, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 F.C.C.2d 50 (1980) (*Computer II Reconsidered Decision*); Memorandum Opinion and Order on Further Reconsideration, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 88 F.C.C.2d 512 (1981) (*Computer II Further Reconsidered Decision*). These orders will be referred to by their designated short forms in the text and footnotes that follow.

munications and data processing in a proceeding known as the *First Computer Inquiry* or *Computer I*,² begun in 1966.³ The proceeding culminated in 1971 with the adoption of rules delineating the circumstances in which computer use by common carriers constituted common carrier communication subject to regulation under Title II of the Act⁴ and when such use constituted unregulated data processing.⁵ Under the *Computer I* regime, the Commission looked at the manner in which computerization was employed to determine how a service would be regulated. To facilitate this functional approach, the Commission distinguished between communications services using com-

² Tentative Decision of the Commission, *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 291 (1970) (*Computer I Tentative Decision*); Final Decision and Order, *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971) (*Computer I Final Decision*), *aff'd in part and rev'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973).

³ See Notice of Inquiry, *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 F.C.C.2d 11 (1966); Supplemental Notice of Inquiry, *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 F.C.C.2d 19 (1967).

⁴ The Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976), is composed of three titles. Title I contains general provisions of the Act. *Id.* §§ 151-155. Title III provides for Commission regulation of broadcasting. *Id.* §§ 301-397. Title II, *id.* §§ 201-222, gives the Commission authority over common carrier interstate or foreign communication by wire or radio. The Commission has the power under Title II to adjudge the lawfulness of proposed charges, classifications, regulations, and practices, *id.* § 204, and if it finds them unlawful, to prescribe just and reasonable ones, *id.* § 205.

⁵ These rules are found at 36 Fed. Reg. 5345, 5353-54 (1971).

puters to perform message or circuit switching, which were regulated, and data processing services, which were left to marketplace competition.⁶ The regulatory status of "hybrid" services, which combined both communications and data processing functions, was to be determined on a case-by-case basis depending upon which function was predominant.⁷

In *Computer I* the Commission also set forth the conditions under which a common carrier could enter the data processing marketplace. The rules required "maximum separation" of a common carrier's communications activities from its unregulated data processing services.⁸ This requirement was designed to prevent common carriers from unfairly burdening their regulated communications services with costs properly attributable to unregulated data processing services.⁹

⁶ The Commission defined data processing as "use of a computer for the processing of information as distinguished from circuit or message-switching." *Computer I Tentative Decision*, 28 F.C.C.2d at 295. "Message-switching" was defined as "[t]he computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered." *Id.* at 296.

⁷ See *Computer I Final Decision*, 28 F.C.C.2d at 276-79; *Computer I Tentative Decision*, 28 F.C.C.2d at 305.

⁸ The "maximum separation" requirement meant that common carriers could offer data processing services only through a separate corporate entity having separate accounting records, personnel, and equipment and facilities. See *Computer II Final Decision*, 77 F.C.C.2d at 391 n.2.

⁹ *Computer I Final Decision*, 28 F.C.C.2d at 270-71. The Commission forbade AT&T to offer data processing even through a separate subsidiary because the Commission then assumed that AT&T's 1956 consent decree, see discussion *infra* pages 45-47, precluded the company from offering data processing services. *Id.* at 282; see *Computer I Tentative Decision*, 28 F.C.C.2d at 298-99, 305.

The *Computer I* rules were sustained by the Second Circuit,¹⁰ but even as they were being implemented, technological developments rendered them nearly obsolete.¹¹ As computer and communications technology continued to merge, the line between regulated and unregulated activities became increasingly blurred, and the *Computer I* definitions became unworkable.¹² In addition, both the data processing and the communications industries were becoming increasingly competitive¹³ and therefore less

¹⁰ *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973). Certain provisions involving regulation of data processing services were set aside. *Id.* at 732-36, 737.

¹¹ *See Computer II Final Decision*, 77 F.C.C.2d at 391-93.

¹² For example, technological advances made it possible for significant data processing functions to be performed in numerous computer terminals distributed throughout the communications network rather than in just one central computer. *See id.* It therefore became increasingly difficult to classify terminals and services as either communications or data processing. AT&T's proposal in 1975 to market a sophisticated terminal device, the Dataspeed 40/4, highlighted the problems inherent in the *Computer I* definitional approach. The Dataspeed 40/4 had data processing capabilities that enabled it to perform some functions that would have been performed in a central computer at the time the 1971 rules were adopted. Thus, many argued that the Commission should reject AT&T's proposal because it was offering a hybrid data processing service. Although the Commission ultimately classified the Dataspeed 40/4 as a communications service, it recognized the inadequacy of the 1971 rules for dealing with new technologies. *See In re American Telephone and Telegraph Co. (AT&T)*, 62 F.C.C. 2d 21, 30-31 (1977), *aff'd sub nom. International Business Machines Corp. v. FCC*, 570 F.2d 452 (2d Cir. 1978). Between 1975, when the Dataspeed 40/4 was first offered, and 1977, when the Commission determined that the Dataspeed 40/4 was primarily a communications service, consumers were deprived of this valuable new technology.

¹³ *See Computer II Final Decision*, 77 F.C.C.2d at 433-34.

susceptible to the type of abuses the Commission had sought to discourage through its *Computer I* rules.¹⁴

Thus, in 1976 the Commission instituted the *Second Computer Inquiry* to reexamine its definitional structure and to find a more workable regulatory approach.¹⁵ Five years and thousands of pages of comments later, the Commission ended its study by making major changes in the regulatory regime. The Commission hopes that these changes will provide greater certainty and predictability of regulation for the subject companies and will enhance competition in communications and data processing.¹⁶

In *Computer II* the Commission abandoned the attempt to classify activities as either communications or data processing based on the nature of the processing per-

¹⁴ In the telecommunications marketplace, the increase in competition is, in part, a result of Commission decisions allowing customer premises equipment (CPE) provided by non-common carriers to be directly connected to the interstate communications network. Traditionally, common carriers limited access to their transmission services to customers with carrier-provided CPE. In its 1968 *Carterfone* decision, however, the Commission required carriers to provide access to transmission services to customers with non-carrier-provided CPE. *Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968); *see* Interstate and Foreign Message Toll Telephone, 56 F.C.C.2d 593 (1975), *clarified*, 59 F.C.C.2d 83 (1976), *aff'd sub nom.* North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *see also Computer II Final Decision*, 77 F.C.C.2d at 439-40. CPE includes the basic telephone, answering machines, key systems, and PBX switchboards.

¹⁵ *See* Notice of Inquiry and Proposed Rulemaking, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations, 61 F.C.C.2d 103, 107 (1976) (*Notice of Inquiry*); *see also* Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry), 64 F.C.C.2d 771 (1977) (*Supplemental Notice of Inquiry*).

¹⁶ *Computer II Final Decision*, 77 F.C.C.2d at 423, 428-30.

formed. The respective technologies had become so intertwined, according to the Commission, that it had become impossible to draw an "enduring line of demarcation" between them.¹⁷ In the course of its *Second Computer Inquiry*, the Commission concluded that the only clear and lasting distinction would be one between basic transmission service on the one hand and enhanced services and customer premises equipment (CPE) on the other.¹⁸ According to the Commission, drawing the regulatory line in this way would minimize the type of ad hoc adjudication that had taken place under the 1971 rules.¹⁹ In addition, such a distinction would make it possible to eliminate unneeded regulation and thereby promote efficient use of the telecommunications network.²⁰

Under the *Computer II* scheme, the Commission continued to require common carriers to provide basic transmission services under tariff on an equal basis to all customers. The Commission found that enhanced services and CPE were not within the scope of its Title II juris-

¹⁷ *Id.* at 430.

¹⁸ Basic service is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Id.* at 419-20. Enhanced service is any service other than basic service. Enhanced service "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387. An example of enhanced service is AT&T's Dial It service, whereby subscribers dial a certain number to gain access to stored information such as the scores of professional sports contests. See *Computer II Reconsidered Decision*, 84 F.C.C.2d at 55.

¹⁹ *Computer II Final Decision*, 77 F.C.C.2d at 425, 434-35; see note 12 *supra*.

²⁰ *Computer II Final Decision*, 77 F.C.C.2d at 387.

diction but were within its ancillary jurisdiction.²¹ Accordingly, the Commission discontinued Title II regulation of enhanced services and, with the exception of AT&T,²² relieved common carriers of the "maximum separation" requirement upon which their offerings of enhanced services were conditioned under *Computer I*.²³ Similarly, the Commission "unbundled" CPE from basic transmission services by discontinuing rate regulation of CPE and ordering that CPE be sold separately from basic communications service in a competitive market.²⁴ The *Computer II* rules also required common carriers to keep separate accounts of their regulated basic service and their competitive services. Thus, the carriers must sell their basic service to themselves at the tariff rate when they provide enhanced services to their customers. These requirements were designed to prevent "cross-subsidization" of a carrier's unregulated services by its regulated services.²⁵

The Commission declared that its regulatory policy respecting interstate facilities or services preempted in-

²¹ *Id.* at 431-35, 450-52; see notes 38-40 & 53-55 *infra* and accompanying text.

²² Because of AT&T's pervasive market power, the Commission decided to permit it to offer enhanced services only through a separate subsidiary. Originally the Commission decided to also subject GTE to this separate subsidiary requirement, *Computer II Final Decision*, 77 F.C.C.2d at 474, but, on reconsideration, exempted GTE, *Computer II Reconsidered Decision*, 84 F.C.C.2d at 72.

²³ *Computer II Final Decision*, 77 F.C.C.2d at 388-89; see note 8 *supra*.

²⁴ *Computer II Final Decision*, 77 F.C.C.2d at 388-89.

²⁵ Cross-subsidization occurs when a carrier misattributes costs incurred in the provision of unregulated services to the provision of regulated services. Because rates for regulated services are based partially upon the cost of providing those services, misattribution of costs results in the carrier's monopoly ratepayers' bearing a part of the cost of unregulated services. See *id.* at 445, 476-77.

consistent state regulation of those services or facilities.²⁶ Although the Commission was careful to limit the area of preemption, some preemption of state regulation was deemed necessary because the same facilities are usually used for both interstate and intrastate communications.²⁷ For the federal program of deregulation to work, state regulation of CPE and enhanced services had to be circumscribed.²⁸

During its proceedings, the Commission considered the effect of the proposed regulatory changes on AT&T's continued offering of CPE and enhanced services in light of a 1956 consent decree limiting AT&T to providing services that are "subject to public regulation" and activities "incidental" thereto.²⁹ The Commission recognized that it could not definitively construe the decree³⁰ but stated its view that AT&T's participation in the new regulatory scheme would be consistent with the decree.³¹

II. ANALYSIS

The arguments supporting and challenging the *Computer II* decision are as numerous as the parties before this court. Seemingly, every argument ever made in an administrative law case is pressed here in some form. We

²⁶ *Computer II Reconsidered Decision*, 84 F.C.C.2d at 104; *Computer II Further Reconsidered Decision*, 88 F.C.C.2d at 523-24, 541-42.

²⁷ *Computer II Final Decision*, 77 F.C.C.2d at 455-57.

²⁸ *Computer II Further Reconsidered Decision*, 88 F.C.C.2d at 541 n.34.

²⁹ *United States v. Western Electric Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, at 71, 137-38 (D.N.J. 1956); see *Computer II Reconsidered Decision*, 84 F.C.C.2d at 106.

³⁰ *Computer II Final Decision*, 77 F.C.C.2d at 492.

³¹ *Computer II Reconsidered Decision*, 84 F.C.C.2d at 106; see generally *id.* at 105-09; *Computer II Final Decision*, 77 F.C.C.2d at 490-95.

consider it unnecessary to address all the arguments presented to us, and grounds for challenging the Commission's decision not mentioned herein should be considered rejected. We will, however, address four of the most controversial aspects of the Commission's decision.

First, many contend that the Commission erred in concluding that CPE and enhanced services are not appropriate subjects for Title II regulation. Others argue that in its *Computer II* orders the Commission gave an unsupportably expansive reading to its ancillary jurisdiction to regulate non-Title II activities.

Second, many parties—particularly the state regulatory commissions—view the Commission's preemption of inconsistent state regulation as an invasion of ratemaking authority reserved to the states under the Communications Act. These parties urge us to declare that the states continue to have authority to regulate CPE used jointly in interstate and intrastate commerce. In addition, these parties argue that the Commission failed to give adequate notice of its intention to preempt state regulation.

Third, some argue that the "maximum separation" requirement should have been imposed on other carriers in addition to AT&T. Various parties also believe that AT&T should have been subjected to tighter regulation than that contemplated under *Computer II*.

Finally, some parties contend that the Commission based its decision on a misinterpretation of the 1956 consent decree between AT&T and the United States. This issue has apparently been mooted by vacation of the consent decree as part of the recent settlement of the Justice Department's antitrust suit against AT&T. Nevertheless, we will address it briefly.

A. *The Deregulation of Enhanced Services and CPE*

The most fundamental challenge to the *Computer II* decision is the claim that the Commission has impermis-

sibly deregulated enhanced services, CPE, or both. Although framed in different ways by the various parties, the point of the argument is that the Commission is required to regulate carrier-provided enhanced services and CPE under Title II of the Act. We believe that the Commission's reading of the Act is supportable and that its concomitant regulatory scheme is a rational and amply explained policy choice.

We turn first to the Commission's treatment of enhanced services. Title II of the Act empowers the Commission to impose rate regulation only upon common carriers "engaged in interstate or foreign communication by wire or radio."³² As the relationship between data processing and communications became increasingly close, the Commission decided in the *First Computer Inquiry* not to regulate the rates charged for data processing services.³³ This decision forced the Commission to evaluate case by case the character of new services combining data processing and communications to determine whether the new services were to be regulated.³⁴ By the time of the *Second Computer Inquiry*, this task had become practically impossible.³⁵ Consequently, the Commission was compelled to choose a new regulatory path to fulfill its statutory duty "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service."³⁶

Two paths were available to the Commission: regulate all combined data processing and communications services under Title II, or regulate none.³⁷ Electing the first path

³² 47 U.S.C. § 201(a) (1976) (emphasis added).

³³ See *Computer II Final Decision*, 77 F.C.C.2d at 390.

³⁴ See *id.*

³⁵ *Id.* at 393.

³⁶ 47 U.S.C. § 151 (1976).

³⁷ *Computer II Final Decision*, 77 F.C.C.2d at 428.

would have required the Commission to reverse its policy, established in *Computer I*, of not regulating data processing services and would also have required the Commission to confront the issue of its authority to exert Title II jurisdiction over data processing. Instead, the Commission chose the alternative course and decided not to impose Title II regulation on any combined data processing and communications services, which the Commission termed "enhanced services."

Although the Commission did not impose Title II regulation on enhanced services, it determined that it has ancillary jurisdiction over enhanced services under sections 152 and 153 of the Act. Section 152 gives the Commission jurisdiction over "all interstate and foreign communication by wire or radio,"³⁸ and section 153 defines "communication by wire" as "the transmission of writing, signs, signals, pictures and sounds of all kinds . . . incidental to such transmission."³⁹ The Commission found that enhanced services fall within its ancillary jurisdiction as incidental transmissions over the interstate telecommunications network.⁴⁰

Nevertheless, the Commission declined to institute a comprehensive regulatory scheme for enhanced services. Because the Commission found that the market for enhanced services is "truly competitive,"⁴¹ it believes that market forces will protect the public interest in reasonable rates and availability of services. Therefore, in the Commission's view, comprehensive regulation of enhanced services would not be permissible because it would not be "di-

³⁸ 47 U.S.C. § 152(a) (1976).

³⁹ *Id.* § 153(a)-(b).

⁴⁰ *Computer II Final Decision*, 77 F.C.C.2d at 432.

⁴¹ *Id.* at 433.

rected at protecting or promoting a statutory purpose.”⁴² The one exception to the Commission’s policy of not regulating enhanced services is its imposition of a structural separation requirement on AT&T under which AT&T can offer enhanced services to consumers only through a separate subsidiary.

In dealing with CPE the Commission faced a dilemma similar to the one it confronted in the case of enhanced services. Traditionally, the Commission required CPE provided by common carriers to be included in the tariffs for their transmission services under Title II. This “bundling” of equipment charges into transmission rates was, in effect, Title II regulation of CPE, justified on the ground that equipment like the telephone handset was part of an “end-to-end” common carrier service.⁴³ In recent years, however, CPE has evolved from the “plain old telephone,” which merely sends and receives communications signals, into sophisticated home computer terminals like the Dataspeed 40/4⁴⁴ that incorporate both communications and data processing elements. Additionally, non-common carriers are now competitively furnishing CPE for connection with common carrier transmission lines.⁴⁵ These developments cast doubt on the propriety of the continued bundling of CPE charges into carrier transmission rates since, as the Commission found, bundling limits the range of CPE available to consumers.⁴⁶

⁴² *Id.*; see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 175-78 (1968).

⁴³ See *Computer II Final Decision*, 77 F.C.C.2d at 446; *Computer II Reconsidered Decision*, 84 F.C.C.2d at 99.

⁴⁴ See note 12 *supra*.

⁴⁵ See *Computer II Final Decision*, 77 F.C.C.2d at 439-41.

⁴⁶ *Id.* at 442.

Thus, the Commission again faced a regulatory crossroads. Because the Commission had decided in *Computer I* not to regulate data processing services,⁴⁷ it first considered an approach that would have determined the regulatory status of CPE by classifying it as either communications or data processing.⁴⁸ Finding that such a demarcation would inhibit innovation in the production and marketing of CPE by fostering regulatory uncertainty, the Commission discarded the definitional approach, as it had with enhanced services.⁴⁹ The Commission was then left with the choice of regulating all CPE under Title II or regulating none. The Commission made the same choice it had made in the case of enhanced services: no CPE would be regulated under Title II.⁵⁰ The Commission determined that CPE is not common carrier communications within the scope of Title II⁵¹ and further found that charges for CPE provided by carriers need no longer be regulated via bundling because of the competitive market conditions now prevailing.⁵²

Although the Commission discontinued Title II regulation of CPE, it exerted ancillary jurisdiction over carrier-provided CPE. As it had with enhanced services, the Commission found that CPE is within the scope of sections 152 and 153 of the Act, which gives the Commission jurisdiction over "all instrumentalities, facilities, apparatus, and services . . . incidental to" ⁵³ "interstate and foreign communication by wire or radio." ⁵⁴ The exertion of

⁴⁷ See text accompanying notes 2-9 *supra*.

⁴⁸ See *Computer II Final Decision*, 77 F.C.C.2d at 436.

⁴⁹ *Id.*

⁵⁰ *Id.* at 439.

⁵¹ *Computer II Reconsidered Decision*, 84 F.C.C.2d at 61, 65.

⁵² *Computer II Final Decision*, 77 F.C.C.2d at 439.

⁵³ 47 U.S.C. § 153(a) (1976).

⁵⁴ *Id.* § 152; see *Computer II Final Decision*, 77 F.C.C.2d at 450-52.

jurisdiction over CPE pursuant to these sections was justified, the Commission found, because including CPE charges in tariffs has a direct effect upon interstate transmission rates.⁵⁵ The Commission therefore ordered, first, that all CPE be unbundled from transmission services; that is, no carrier can offer CPE as part of a transmission offering. Second, the Commission ordered that AT&T can offer CPE only through a separate subsidiary. These requirements were designed to ensure fair competition in the CPE market and to prevent AT&T from cross-subsidizing its competitive services through its monopoly services.

Clearly, the Commission's decisions with regard to enhanced services and CPE are complementary. In both cases the Commission confronted rapid technological and market changes and attempted to draw definitional boundaries for the purpose of limiting Title II regulation. In both cases this task proved impossible, and the Commission therefore decided to treat all enhanced services and all CPE alike and remove them from the scope of Title II. The Commission relied in both cases on newly emergent market forces and the exercise of its own ancillary jurisdiction to protect the public interest by assuring availability of enhanced services and CPE at reasonable prices.

The parties' challenges to the Commission's regulatory scheme rest primarily on two bases: first, that the Commission is guilty of impermissible forbearance from Title II regulation in discontinuing rate regulation of all enhanced services and CPE, and second, that the Commission overreached its ancillary jurisdiction in imposing the separation requirement on AT&T and ordering the unbundling of CPE. We view the Commission's decision in *Computer II* as a demarcation of the scope of Title II jurisdiction in a volatile and highly specialized field and a concomitant substitution of alternative regulatory tools for

⁵⁵ *Computer II Final Decision*, 77 F.C.C.2d at 441-46.

traditional Title II regulation in this field. Our analysis proceeds from this foundation.

We first address the Commission's finding that enhanced services and CPE are not common carrier services within the scope of Title II. As we understand it, the Commission's finding in regard to enhanced services has two alternative bases. First, the Commission found that the provision of an enhanced service is not a common carrier activity and, thus, is outside the scope of Title II.⁶⁶ Alternatively, the Commission found that even if some enhanced services might be common carrier communications activities within the reach of Title II, it is not required to identify those services and subject them to Title II regulation.⁶⁷ A policy of identifying regulable enhanced services would, in the Commission's view, be a reversion to the futile *Computer I* case-by-case approach that inhibited technological innovation and diverted Commission resources from more beneficial activities.⁶⁸

Likewise, the Commission's decision that CPE is not within the scope of Title II rests on two bases. First, the Commission determined that CPE is not itself a common carrier communication service regulable under Title II. In reaching this conclusion, the Commission noted that competition in the CPE market and innovation in the CPE industry occurring apart from the telecommunications network demonstrate that CPE is severable from communications transmission services. Second, the Commission determined that charges for carrier-provided CPE, which traditionally have been regulated in connection with the carrier's provision of transmission services, need no longer be regulated because the new competition in the CPE industry will assure the availability of CPE at reasonable prices.

⁶⁶ *Id.* at 430-32.

⁶⁷ *Id.* at 434-35.

⁶⁸ *Id.* at 426-27, 434-35.

We believe the Commission's decision not to subject enhanced services or CPE to Title II regulation is sustainable on either of the grounds asserted by the Commission. The Commission's finding that enhanced services and CPE are not common carrier communications activities within Title II is reasonable. Although the Act authorizes regulation of the rates charged for common carrier services, it does not define the term "common carrier." We have noted previously that "the term 'common carrier' has a coherent legal meaning which courts can grasp and apply in reviewing the Commission construction of its own Act."⁶⁰ In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*), we observed that the essential element of common carriage is the carrier's undertaking "to carry for all people indifferently."⁶¹ In the communications context, this means providing a service whereby customers may "transmit intelligence of their own design and choosing."⁶¹

In *Computer II* the Commission found that enhanced services are not the kind of general public offerings this court regarded as common carriage in *NARUC I*. Inherent in enhanced service offerings is the ability of vendors to tailor their services to meet the particularized needs of individual customers.⁶² In the Commission's view, this

⁶⁰ *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976) (*NARUC II*) (opinion of Wilkey, J.) (footnote omitted). It is clear that an entity can be a common carrier with respect to only some of its activities. *Id.* at 608. In this opinion the term "common carrier" will be used to indicate not an entity but rather an activity as to which an entity is a common carrier.

⁶¹ *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976) (*NARUC I*) (quoting *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

⁶² *Id.* at 641 n.58 (quoting *Industrial Radiolocation Service*, 5 F.C.C.2d 197, 202 (1966)).

⁶³ *Computer II Final Decision*, 77 F.C.C.2d at 431.

characteristic distinguishes enhanced services from basic services, which are subject to traditional Title II regulation. Further, the Commission found that the severability of CPE from transmission services and the competitive nature of the CPE market demonstrated that CPE is not within the definition of common carriage.

We believe the Commission's judgment that enhanced services do not constitute common carrier communications activities is reasonable and amply supported. The Commission's finding was based upon intensive study of a rapidly changing and highly technical field and was informed by the comments of a large number of participants in the communications and data processing industries. Given the great variety of specialized enhanced services now available to consumers, it is reasonable to find that providers of these services generally are not common carriers because they will "make individualized decisions in particular cases whether and on what terms to serve."⁸³

Likewise, the Commission's judgment that CPE is not a common carrier service within Title II is clearly supported. CPE was originally regulated under Title II because regulation was thought necessary for the effective functioning of the interstate communications network, a premise that the Commission has now rejected as fallacious.⁸⁴ The severability of CPE from underlying common carrier transmission services, demonstrated by the healthy competition in the CPE market by non-common carriers, supports the Commission's conclusion that CPE is not a common carrier activity within Title II. Moreover, as in any competitive market, provision of CPE is based upon "individualized decisions, in particular cases, whether and on what terms to deal,"⁸⁵ the hallmark of a non-common carrier service.

⁸³ *NARUC II*, 533 F.2d at 609 (footnote omitted).

⁸⁴ *Computer II Final Decision*, 77 F.C.C.2d at 446.

⁸⁵ *NARUC I*, 525 F.2d at 641 (footnote omitted).

We also find that the Commission's decision is sustainable on the alternative policy ground. We agree with the Commission that even if some enhanced services could be classified as common carrier communications activities, the Commission is not required to subject them to Title II regulation where, as here, it finds that it cannot feasibly separate regulable from nonregulable services. To the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as common carrier services, we sanction the Commission's forbearance from Title II regulation. We emphasize, however, that our sanction is a very narrow one, given in light of the peculiar nature of the communications and data processing industries and the alternative regulatory scheme adopted by the Commission.

The Commission's announced policy is to promote the "efficient utilization and full exploitation of the interstate telecommunications network."⁶⁶ This can be best accomplished, in the Commission's view, by regulating the rates of only those activities *clearly* within the scope of Title II.⁶⁷ This policy, combined with the Commission's decision in *Computer I* not to regulate data processing services under Title II,⁶⁸ compelled the Commission's decision to repudiate an ad hoc approach to determining which enhanced services were regulable as common carrier services. Such case-by-case determinations, the Commission found, would defeat the purpose of the Communications Act, first, by creating regulatory uncertainty that would inhibit market entry and thus limit the range of services available to consumers and, second, by absorbing Commission resources that would be better employed elsewhere.⁶⁹

⁶⁶ *Computer II Final Decision*, 77 F.C.C.2d at 429.

⁶⁷ *Id.*

⁶⁸ That decision was largely upheld by the Second Circuit in *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973). The two rules struck down in *GTE Service Corp.* are not relevant here.

⁶⁹ *Computer II Final Decision*, 77 F.C.C.2d at 429-30, 434-35.

Instead of regulating enhanced services under Title II, the Commission used its ancillary jurisdiction to impose upon AT&T a structural regulation scheme that requires AT&T to offer enhanced services only through a separate subsidiary. The Commission found that this separation requirement will effectively protect the public interest by limiting the power of AT&T to gain an unfair advantage in the marketplace by cross-subsidizing its competitive services by its monopoly ones. We believe this to be a sufficient basis to support the Commission's decision not to regulate enhanced services under Title II. Once the difficulty of isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation, then the Commission is justified in conserving its energies for more efficacious undertakings, at least when it establishes an alternative regulatory scheme under its ancillary jurisdiction.

As it did in the case of enhanced services, the Commission decided on policy grounds not to regulate some CPE—carrier-provided CPE—that it could have permissibly regulated under Title II. This forbearance is lawful. We have already upheld the Commission's finding that provision of CPE is not itself a common carrier activity within Title II. Thus, the Commission could regulate the rates for carrier-provided CPE only if it were necessary to ensure the availability of Title II-regulated communications service at reasonable rates. The Commission found that CPE is now available in an increasingly competitive market, which indicates that CPE will be available at reasonable prices. The Commission further found that discontinuing Title II regulation of all CPE will create economic incentives for carriers to structure services so that customers pay only for what they need.⁷⁰ These findings amply support the Commission's conclusion that regulation of charges for carrier-provided CPE is not necessary to protect the public interest.

⁷⁰ *Id.* at 429-30.

Instead of regulating charges for CPE, the Commission has, as in the case of enhanced services, exercised its ancillary jurisdiction to forbid carriers from offering CPE as part of a transmission service and to require AT&T to provide CPE only through a separate subsidiary. The Commission believes that these regulations will ensure healthy competition in the CPE market and will protect the free market forces which will ensure the availability of CPE at reasonable prices by preventing AT&T from cross-subsidizing its competitive services through its monopoly services. We have previously noted our reluctance "to declare that free market forces must be supplanted by rate regulation when neither Congress nor the [agency] has found it essential."⁷¹ We do not believe that Congress required the Commission to regulate carrier-provided CPE under Title II when the agency has determined that an alternative regulatory scheme would more effectively further the goals of the Act. Since the agency's view on this point is reasonable and well supported, we refuse to require the Commission to regulate carrier-provided CPE under Title II.

Our approval of limited forbearance from Title II regulation of common carrier services by the Commission does not give the Commission unfettered discretion to regulate or not regulate common carrier services. This is not a case in which the Commission has attempted to end Title II regulation without substituting other regulatory tools. In *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966), we upheld the Commission's decision to regulate CATV systems as "adjuncts of the nation's broadcasting system"⁷² rather than as common carriers under Title II, even though we assumed that CATV systems were common carriers. We concluded that

⁷¹ *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 204 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

⁷² 359 F.2d at 284.

the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation.⁷³ Here, as in *Philadelphia Television*, we are faced only with the issue whether the Commission's discretion extends to deciding *what regulatory tools to use in regulating common carrier services*:

In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing *which* jurisdictional base and *which* regulatory tools will be most effective in advancing the Congressional objective.⁷⁴

The Second Circuit recently addressed a regulatory scheme similar to that established in *Computer II* and upheld the Commission's action. In *Western Union Telegraph Co. v. FCC*, 674 F.2d 160 (2d Cir. 1982), the court reviewed a Commission order requiring international record carriers to remove their offerings of Telex terminal equipment from tariff. The court upheld the deregulation on alternative grounds. The Commission determined that provision of terminal equipment is not a common carrier communications service in the traditional sense, and the court held this to be reasonable. In the court's view, the petitioners had offered "nothing which casts doubt on the Commission's conclusion that the manufacture and provision of terminal equipment are highly competitive and involve many firms which are not communications carriers. To find in such circumstances that providing terminal equipment is not a communications service is hardly irrational."⁷⁵

⁷³ *Id.*

⁷⁴ *Id.* at 284 (emphasis added).

⁷⁵ 674 F.2d at 166-67.

Moreover, the court rejected petitioners' allegation that continued Title II regulation of terminal equipment was necessary to realize the Commission's statutory goals: "While [petitioners] might believe that IRC transmission rates could be better controlled if equipment remained tariffed, the Commission has broad discretion to choose which regulatory tools to employ . . . and its decision must be upheld unless it is irrational" ⁷⁶ The regulatory tools that the court found reasonable were newly unleashed market forces buttressed by the likely future entry of Western Union into the international Telex market. ⁷⁷ Because the Commission did not attempt to exercise ancillary jurisdiction over the provision of Telex terminal equipment, the regulatory scheme upheld by the Second Circuit was even less stringent than the regulatory scheme established in *Computer II*.

The Commission's exercise of ancillary jurisdiction to impose the separation requirement on AT&T is an integral part of the *Computer II* regulatory scheme. Several parties attack the validity of this assertion of ancillary jurisdiction by the Commission. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), it was settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the Act over activities that are not within the reach of Title II. ⁷⁸ In that case, however, the Supreme Court limited the Commission's jurisdiction to that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities." ⁷⁹ One of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices. ⁸⁰

⁷⁶ *Id.* at 165-66 (citations omitted).

⁷⁷ *Id.* at 166.

⁷⁸ *United States v. Southwestern Cable Co.*, 392 U.S. at 172-73.

⁷⁹ *Id.* at 178.

⁸⁰ 47 U.S.C. § 152 (1976).

In *Computer II* the Commission found that the exercise of ancillary jurisdiction over both enhanced services and CPE was necessary to assure wire communications services at reasonable rates. Regulation of enhanced services was deemed necessary to prevent AT&T from burdening its basic transmission service customers with part of the cost of providing competitive enhanced services. This conclusion was based upon detailed findings on AT&T's market power and its ability to underwrite its competitive offerings with profits from its monopoly services.⁸¹ We believe this conclusion is well founded. Because rates for services provided under tariff are based partly upon the costs of providing those services, any misallocation of costs between an entity's competitive and monopoly services would allow the carrier to justify higher rates for its monopoly services. Given this potentially symbiotic relationship between competitive and monopoly services, the agency charged with ensuring that monopoly rates are just and reasonable can legitimately exercise jurisdiction over the provision of competitive services.

Likewise, we believe the Commission acted reasonably in ordering, pursuant to its ancillary jurisdiction, that CPE be removed from tariff. The Commission found that bundling CPE charges into transmission rates has a direct effect upon rates for interstate transmission services.⁸² The Commission therefore concluded that exercising jurisdiction over CPE was necessary to carry out its duty to assure the availability of transmission services at reasonable rates. We believe that both the Commission's finding and its conclusion were reasonable. Because CPE charges are not based on usage, including the costs of providing CPE in the calculus for determining the reasonableness of a carrier's rates makes it difficult to identify accurately the costs of providing transmission services, which are

⁸¹ See *Computer II Final Decision*, 77 F.C.C.2d at 466-70.

⁸² *Id.* at 441, 444-46.

priced according to usage. It was therefore reasonable for the Commission to exercise jurisdiction over carrier-provided CPE to ensure that rates for carrier transmission services are not based upon costs associated with the provision of CPE. Thus we conclude that the Commission's exertion of jurisdiction over enhanced services and carrier-provided CPE was "reasonably ancillary" under the *Southwestern Cable* standard.

In designing the Communications Act, Congress sought "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications."⁸³ Congress thus hoped "to avoid the necessity of repetitive legislation."⁸⁴ In *Computer II* the Commission took full advantage of its broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data processing. Because the Commission's judgment on "how the public interest is best served is entitled to substantial judicial deference,"⁸⁵ the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious.⁸⁶ Our review of the Commission's decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and CPE. We therefore uphold the *Computer II* scheme.

⁸³ *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971).

⁸⁴ *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 199 (D.C. Cir. 1969) (footnote omitted), *cert. denied*, 397 U.S. 922 (1970); *see General Telephone Co. of California v. FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

⁸⁵ *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

⁸⁶ 5 U.S.C. § 706(2) (a) (1976); *see, e.g., Malrite Television v. FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

B. *Preemption of State Regulation of CPE*

Some parties argue that the Commission's decision to order the states to remove CPE charges from their tariffs is an unjustifiable invasion of the authority to regulate intrastate communications services reserved to the states by the Act. To determine whether the Commission acted properly in preempting state tariffing of CPE, we must examine the Commission's powers under the Act and the asserted justification for preempting state regulation.

We have already held that the exertion of ancillary jurisdiction over carrier-provided CPE was proper under section 2(a) of the Act, which gives the Commission broad authority over "all interstate and foreign communication by wire or radio,"⁸⁷ and section 3(a) of the Act, which defines "communication by wire" to include not only transmission but also "all instrumentalities, facilities, [and] apparatus . . . incidental to such transmission."⁸⁸ Many parties argue, however, that the Commission cannot exercise its ancillary jurisdiction so as to preempt state regulation of CPE. The conflict between federal and state power over CPE arises because most CPE in this country is used interchangeably for both interstate and intrastate communication and has traditionally been subject to both state and federal regulation. The cost of providing CPE has been apportioned between interstate and intrastate use and then bundled into the appropriate transmission rates.⁸⁹ Thus, it is argued, the Commission's assertion of its ancillary jurisdiction to require removal of CPE charges from state tariffs conflicts with section 2(b) of the Act, which confers on the states jurisdiction over instrumentalities of intrastate communication.⁹⁰

⁸⁷ 47 U.S.C. § 152(a) (1976).

⁸⁸ *Id.* § 153(a).

⁸⁹ See *Computer II Final Decision*, 77 F.C.C.2d at 441-42.

⁹⁰ 47 U.S.C. § 152(b) (1976).

The Commission asserts that preemption of state regulation is justified in this case because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE. We agree. Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount⁸¹ and conflicting state regulations must necessarily yield to the federal regulatory scheme.⁸² In *Computer II* the Commission found that its policy of promoting the "efficient utilization and full exploitation of the interstate telecommunications network"⁸³ is furthered by fostering competition in the CPE market and giving consumers an unfettered selection of CPE. According to the Commission, competition in the equipment market has had the beneficial effects of stimulating innovation, making available a wider range of equipment, improving maintenance and reliability, and increasing purchase, payment, and installation options.⁸⁴ When charges for CPE are bundled into transmission charges, the Commission found, the benefits of a competitive market are partially lost because consumers' freedom of choice is limited. Only if charges for CPE are entirely separate from charges for transmission service will consumers be free to select the CPE that best suits their individual needs and preferences.⁸⁵

⁸¹ See, e.g., *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *California v. FCC*, 567 F.2d 84, 86-87 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698-700 (1st Cir. 1977).

⁸² *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *NARUC I*, 525 F.2d at 446-47.

⁸³ *Computer II Final Decision*, 77 F.C.C.2d at 429.

⁸⁴ *Id.* at 439.

⁸⁵ See *id.* at 442-43.

The Commission therefore concluded that the only way to give consumers an unfettered choice of CPE was to require that charges for CPE be completely severed from transmission rates on both the federal and state levels. Since consumers use the same CPE in both interstate and intrastate communications and generally wish to purchase both interstate and intrastate transmission services, the inclusion of CPE in charges for intrastate transmission service will certainly influence the consumer's choice of CPE. The Commission believes this restriction will be detrimental to both the consumer and the interstate communication system. Given the Commission's detailed and logical findings on this point, we cannot say the Commission's conclusion is irrational.

Our decision today is in accord with two leading cases in which the Fourth Circuit recognized that state regulation which impedes a federal regulatory goal must yield to the federal scheme. The Fourth Circuit also confirmed the Commission's jurisdiction over CPE used jointly in interstate and intrastate communications and rejected the argument that section 2(b) of the Act absolutely prohibits federal jurisdiction over jointly used CPE. In *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*), the court upheld the Commission's authority to determine the terms on which consumers may attach non-carrier-provided CPE to transmission facilities used for both interstate and intrastate communications.⁹⁰ The court also held that section 2(b) deprives the Commission of power over local services or facilities only where

their nature and effect are separable from and do not substantially affect the conduct or development

⁹⁰ *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787, 793-95 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1044-52 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*NCUC II*).

of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.⁹⁷

In the second leading case the Fourth Circuit reaffirmed its ruling in *NCUC I*:

[We] correctly reasoned that if section 2(b) (1) were construed to give the states primary authority over joint terminal equipment, i.e., equipment used interchangeably for interstate and intrastate service, then—whenever state regulations conflicted with federal rules applicable to interstate calls—the FCC would necessarily be prevented from discharging its statutory duty under sections 1 and 2(a) to regulate interstate communication.⁹⁸

Computer II is, we believe, just such a case in which conflicting state regulations would impede the Commission in its effort to fulfill its statutory duty.

Several parties attempt to distinguish the *NCUC* cases on the ground that they did not involve Commission attempts to preempt state *ratemaking* authority. They argue that section 2(b) prohibits preemption of state tariffing of CPE. They point out that section 2(b) was designed to protect state authority over intrastate rates, enacted as it was in response to a Supreme Court decision that Congress feared would be read to permit federal agencies to set local rates based on the indirect effects such rates might have on interstate service.⁹⁹ We do not

⁹⁷ *NCUC I*, 537 F.2d at 793.

⁹⁸ *NCUC II*, 552 F.2d at 1045.

⁹⁹ *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914) (*Shreveport*). In *Shreveport* the Supreme Court upheld an ICC order that, in effect, required the revision of intrastate railroad rates that were lower than rates for comparable interstate rail services so as to remove the

believe that section 2(b) prohibits preemption in this case. In *Computer II* the Commission has neither attempted to set rates for intrastate communications services or facilities nor asserted jurisdiction over matters of state concern because of intrastate discrimination against interstate business. Rather, the Commission here exercised its direct authority to determine the regulatory treatment of CPE used for interstate communications.

We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle in this case is precisely the principle that demanded state preemption in the *NCUC* cases. There, the preemption of state regulations that restricted interconnection was justified because those regulations impeded the validly adopted federal policy of unrestricted interconnection. Similarly, in *Computer II* preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy. In *Computer II* the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in *NCUC I* and *II*, the state regulatory power must yield to the federal.

In addition, the Act itself does not distinguish between authority over rates and authority over other aspects of

resulting discrimination against interstate commerce. Congress may well have intended § 2(b) of the Communications Act to prevent such a result in the communications area. See *Federal Communications Commission: Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155 (1934) (statement of K.F. Clardy); *id.* at 155-56 (statement of Andrew R. McDonald); *NCUC II*, 532 F.2d at 1047.

communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities."¹⁰⁰ Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

In the *NCUC* cases, the Fourth Circuit also found that section 221(b) of the Act¹⁰¹ did not constitute a bar to federal control of dual use CPE. That section provides that the Commission has no jurisdiction over state-regulated charges, facilities, or other matters "for or in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication."¹⁰² The Fourth Circuit found on the basis of the legislative history that this provision was merely intended to preserve state regulation of local exchanges that happened to overlap state lines.¹⁰³ We have reviewed the legislative history and also conclude that section 221(b) is inapplicable in the circumstances of this case. Both the Senate and House committee reports specifically note that section 221(b) is intended to enable states "to regulate exchange services in metropolitan areas overlapping State lines."¹⁰⁴ To the extent we appeared in *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972), to take

¹⁰⁰ 47 U.S.C. § 152(b) (1) (1976).

¹⁰¹ *Id.* § 221(b).

¹⁰² *Id.*

¹⁰³ See *NCUC II*, 552 F.2d at 1045; *NCUC I*, 537 F.2d at 795. The Fourth Circuit's interpretation of § 221(b) has been followed by the First Circuit, *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698-99 (1st Cir. 1977), and by the Second Circuit, *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980).

¹⁰⁴ S. REP. NO. 781, 73d Cong., 2d Sess. 5 (1934); H.R. REP. NO. 1850, 73d Cong., 2d Sess. 7 (1934).

a different view of the meaning of section 221 (b), we now reject the *Kitchen* analysis and adopt what we believe to be the more sound interpretation of that section expounded by the Fourth Circuit in the *NCUC* cases.

Some parties also argue that the Commission has unlawfully attempted to preempt state regulation of dual use CPE by creating a vacuum of deregulation. They contend that preemption can be accomplished only by affirmative regulation that occupies the field. These parties misapprehend the Commission's actions. Although the Commission has discontinued Title II regulation of CPE, it has substituted a different, *affirmative* regulatory scheme through its ancillary jurisdiction.¹⁰⁵ Furthermore, we perceive no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction.¹⁰⁶ It is clear to us that the *Computer II* regulations embody a comprehensive federal regulatory scheme, including rules governing the marketing of CPE by common carriers. We agree with the Second Circuit: "Federal regulation need not be heavy-handed in order to preempt state regulation."¹⁰⁷

Some parties argue forcefully that the states, like the Commission, have a responsibility to protect the interests of consumers and that the best way to do this is to continue to tariff CPE. We cannot engage in debate about whether a policy of price control through tariffing or a policy of free competition best serves the public interest

¹⁰⁵ This scheme includes continued regulation of interconnection for all CPE and strengthening of all interconnection opportunities, establishment of unbundled charges, and structural separation to guard against cross-subsidization where necessary.

¹⁰⁶ *Accord Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

¹⁰⁷ *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982).

in this area. All we are empowered to do is to determine whether the Commission had the statutory authority to adopt the policy it did and whether that policy is arbitrary or capricious or an abuse of discretion. We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capricious, nor an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.

It is also contended that the Commission failed to give adequate notice of its intention to detariff CPE and to preempt state tariffing. We reject this argument. In the *Tentative Decision* issued almost a year prior to the *Final Decision*, the Commission retained tariff regulation of "basic" CPE, but queried "whether it would be more advantageous to the consumer for all customer-premises equipment to be provided solely on a non-tariffed basis."¹⁰⁸ The Commission solicited comments on six options, including "deregulation of . . . all customer-premises equipment."¹⁰⁹ The Commission did not, in the *Tentative Decision*, explicitly state that preemption of state regulations was under consideration. Such a statement was not necessary, for preemption of any inconsistent state regulatory scheme would follow automatically under the Supremacy Clause and other principles discussed above. In any event, preemption was explicit in the *Final Decision*. The state parties had—and took full advantage of—opportunities to voice their objections to the Commission's decision. The Commission entertained petitions for reconsideration of the *Final Decision* and in fact made changes to accommodate concerns expressed by the states.¹¹⁰

¹⁰⁸ *Computer II Tentative Decision*, 72 F.C.C.2d at 438.

¹⁰⁹ *Id.* at 441.

¹¹⁰ For example, in its *Reconsidered Decision* the Commission adopted a bifurcation plan that should ameliorate state

We thus reject the parties' challenges to the Commission's power to preempt state regulation of CPE that is inconsistent with the *Computer II* rules.

C. Separation

A number of parties attack the Commission's decision by contending that the separate subsidiary requirement should have been imposed on at least some common carriers in addition to AT&T. Others challenge the separation aspect of the *Computer II* rules on the basis that the separate subsidiary requirement imposed on AT&T is not sufficiently rigorous. In our view both of these arguments represent, in essence, disagreement with a choice made by the Commission among several reasonable policy options. Those who disagree with the Commission's decision on how and where to draw the line regarding the separation question would have this court substitute its judgment for that of the Commission. This we are neither authorized nor inclined to do.

In *Computer II* the Commission sought to strike a reasonable balance between competing concerns; this task was specifically delegated to the agency by Congress and should be accorded special deference by the judiciary. Our function here is only to ensure that the Commission's action in adopting the separation scheme did not constitute an abuse of discretion. We are convinced that the Commission engaged in reasoned decisionmaking well within the scope of its discretion, and we therefore uphold the separation portion of the *Computer II* rules.

In its decision the Commission explained that the maximum separation requirement would apply only to AT&T since, in the Commission's judgment, AT&T is the only

concerns regarding immediate impact on state regulation of existing CPE. In its *Further Reconsidered Decision* the Commission stated that it would allow the states to establish additional accounting requirements and structural separation for carriers other than AT&T.

common carrier having "sufficient market power to engage in effective anti-competitive activity on a national scale and . . . sufficient resources to enter the competitive market through a separate subsidiary."¹¹¹ Originally, the Commission decided to subject GTE to the separation requirement also,¹¹² but after receiving additional comments from the industry, decided to exempt GTE.¹¹³

We believe this to be a reasonable judgment on the Commission's part. The Commission's task of developing a policy to carry out its goal of encouraging competition was a difficult one. Through the separation requirement the Commission sought to protect the public from unfair competition by powerful carriers. At the same time the Commission tried to ensure that competition would be strengthened by the entry of less powerful carriers into the market by exempting from the separation requirement those carriers that cannot engage in significant anti-competitive conduct.

In reaching its decision to impose separation only on AT&T, the Commission considered four factors: (1) the carrier's ability to engage in anti-competitive activity through its control of local exchange facilities, (2) the carrier's ability to cross-subsidize its competitive activities through its monopoly services, (3) the degree to which the carrier possesses integrated research and manufacturing capabilities, and (4) the carrier's economic ability to enter the market through a separate subsidiary.¹¹⁴ The Commission also noted statistics regarding each carrier's revenues, market share, and market size.¹¹⁵ It seems to us that the basis for the Commission's decision

¹¹¹ *Computer II Final Decision*, 77 F.C.C.2d at 469.

¹¹² *Id.* at 389.

¹¹³ *Computer II Reconsidered Decision*, 84 F.C.C.2d at 72.

¹¹⁴ *Id.*

¹¹⁵ *Computer II Final Decision*, 77 F.C.C.2d at 469-71.

is rational and adequately explained. We are not inclined to quarrel with the expert agency's judgment, especially when, as here, the Commission exhibited thoughtful deliberation by exempting GTE from the separation requirement after receiving more information about the nature and extent of GTE's resources.¹¹⁶

Moreover, certain safeguards were adopted with regard to the exempt carriers. For example, if such carriers wish to offer enhanced services, they must sell themselves the basic transmission service "pursuant to the terms and conditions embodied in their tariff."¹¹⁷ Exempt carriers are also required to adopt adequate accounting measures to ensure that costs and revenues from their regulated and unregulated activities are not improperly commingled.¹¹⁸ The Commission noted its readiness to impose the separation requirement more broadly in the future if circumstances warrant.¹¹⁹ We therefore hold that limiting the separation requirement to AT&T was not arbitrary, capricious, or an abuse of discretion.

Likewise, we reject the argument that the structural separation requirement imposed on AT&T is impermissibly lenient. We need not discuss the mechanical details of the separation scheme. It is sufficient to note that the scheme relies upon corporate separateness, accounting procedures, and resale requirements to ensure that no cross-subsidization or unfair competitive practices occur. No aspect of the *Computer II* rules more warrants our deference than these requirements. The Commission, having chosen a permissible regulatory tool—structural separation—set out detailed plans for implementing it.

¹¹⁶ *Computer II Reconsidered Decision*, 84 F.C.C.2d at 72-73.

¹¹⁷ *Id.* at 75 n.19.

¹¹⁸ *Computer II Final Decision*, 77 F.C.C.2d at 476.

¹¹⁹ *Computer II Further Reconsidered Decision*, 88 F.C.C.2d at 541.

These plans were based upon the Commission's own expertise and experience in regulating the communications industry and upon the comments of the members of that industry. This court is ill-prepared to decide which mechanical requirements would best implement the structural separation scheme. Our only province is to determine whether the separation requirements were "based on a consideration of the relevant factors and whether there has been a clear error of judgment."¹²⁰

Among the factors considered by the Commission in formulating the details of the separation scheme were the comments of various parties, business practices in the communications industry, the costs and benefits of various degrees of separation, and the efficacy of various separation tools. We have perused the Commission's decision carefully, and we find that these requirements were based upon consideration of the relevant factors. In addition, we find no clear error of judgment in the Commission's choice of the degree of separation necessary and its reliance upon certain separation tools in preference to others. Therefore, we uphold the *Computer II* separation regulations in their entirety.

D. *Consent Decree Issues*

In 1949 the Justice Department sued AT&T and its manufacturing subsidiary, Western Electric, alleging various antitrust violations. The litigation ended in 1956 when a consent decree was approved by the United States District Court for the District of New Jersey.¹²¹ The consent decree placed severe restrictions on AT&T's entry into unregulated non-communications markets.¹²² In de-

¹²⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹²¹ *United States v. Western Electric Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956).

¹²² Section V of the consent decree prohibits AT&T and all of its subsidiaries, except Western Electric and Western

signing the *Computer II* regulatory scheme, the Commission concluded that AT&T's participation in the new regime would be compatible with the consent decree. Although the Commission recognized that it could not definitively construe the decree,¹²³ it expressed its belief that the separate subsidiary requirement set forth in the *Computer II* decision constituted sufficient "public regulation" of AT&T's offerings of CPE and enhanced services to satisfy the demands of the consent decree.¹²⁴

Several parties urge this court to reverse the Commission's decision in *Computer II* on the theory that it rests upon an *ultra vires* and incorrect interpretation of the 1956 consent decree. They suggest that this court should review and reject the Commission's reading of the decree. This issue has been largely mooted by vacation of the consent decree as part of the settlement of the Justice Department's 1974 antitrust suit against AT&T.¹²⁵

However, we do note that the Commission's consideration of the effect of the consent decree upon the *Computer II* rules was not improper and did not taint the regulations. The Commission did not purport to construe the decree; rather, the existence of the decree and its meaning in the Commission's view were simply circumstances affecting the communications industry. It was entirely

Electric subsidiaries, from engaging in any business activities aside from "the furnishing of common carrier communications services," *id.* at 71,138, defined by Section II(i) as "communications services and facilities . . . the charges for which are subject to public regulation under the Communications Act of 1934," *id.* at 71,137.

¹²³ *Computer II Final Decision*, 77 F.C.C.2d at 492.

¹²⁴ *Id.* at 492-93.

¹²⁵ Opinion, *United States v. American Telephone & Telegraph Co.*, Civ. Action No. 74-1698, at 83-100 (D.D.C. Aug. 11, 1982), as modified, Civ. Action No. 82-0192 (D.D.C. Aug. 24, 1982).

proper for the Commission to take these circumstances into account in formulating the *Computer II* rules. Even though vacation of the decree has now changed these circumstances, it is clear to us that considerations prompted by the decree are not so fundamental to the *Computer II* scheme that the decree's vacation vitiates the basis for the regulations. Thus, we reject the challenges based on the consent decree issue.

III. CONCLUSION

For the foregoing reasons, the decision of the Commission is

Affirmed.

STATUTES

47 U.S.C. § 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to

which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)–(4) of this subsection.

47 U.S.C. § 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected

by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense.

47 U.S.C. §221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

(a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom

service is to be rendered and in the public interest it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

APR 19 1983

ALBERT L. STEVAS,
CLERK

Nos. 82-1331 and 82-1352

In the Supreme Court of the United States**OCTOBER TERM, 1982**

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER**v.****FEDERAL COMMUNICATIONS COMMISSION, ET AL.**

**NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, ET AL., PETITIONERS****v.****FEDERAL COMMUNICATIONS COMMISSION, ET AL.**

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission, in adopting rules and policies requiring that customer premises telephone equipment which is used interchangeably for interstate and intrastate service shall no longer be subjected to tariff regulation, may preempt state regulation that would require continued tariffing of such equipment.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1331

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 82-1352

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-47)¹ is reported at 693 F.2d 198. The decisions of the FCC, known in the industry as the "*Computer II*" decisions, are reported at 77 F.C.C. 2d 384, 84 F.C.C. 2d 50 (1980), and 88 F.C.C. 2d 512 (1981)..

¹"Pet. App." refers to the appendix to the petition in No. 82-1331.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The petition for a writ of certiorari in No. 82-1331 was filed on February 9, 1983, and the petition in No. 82-1352 was filed on February 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 2, 203 and 221 of the Communications Act, 47 U.S.C. 152, 203 and 221, are set forth at Pet. App. A-48 to A-52.

STATEMENT

This case arises from an FCC rulemaking proceeding that made significant changes in the regulatory structure for interstate telecommunications and related data processing and computer activities. In its *Second Computer Inquiry*, or "*Computer II*" decision, the FCC determined that only "basic" interstate telecommunications common carrier services should continue to be subject to regulation under the tariff sections of Title II of the Communications Act, 47 U.S.C. 201-205. The Commission concluded that the provision of customer premises equipment for use in conjunction with interstate telecommunications services was not a common carrier service and should not be regulated pursuant to tariff as a common carrier service.² The Commission also declared that its determinations with respect to the regulation of interstate services and facilities preempted inconsistent or conflicting state regulation of these same

²The Commission also concluded that "enhanced" services (*i.e.*, services that involve more than the pure transmission of messages) should not be subject to tariff regulation, and it adopted structural and accounting rules for the provision, without tariffs, of enhanced services and customer premises equipment. The ruling with respect to enhanced services and the structural and accounting rules are not before this Court.

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activities. The court of appeals affirmed the FCC's decision in its entirety (Pet. App. A-1 to A-47).

1. Telephone companies traditionally have offered services and facilities to the public under tariffs or schedules showing the charges, classifications, practices, and regulations that govern the use of those services and facilities. As a general rule, the telephone companies have offered interstate and foreign services and facilities under tariffs filed with the FCC (47 U.S.C. 203), and have offered intrastate services and facilities under tariffs filed with state regulatory commissions. The Communications Act of 1934 reserves the regulation of purely intrastate service to the states while granting comprehensive regulatory authority over interstate and foreign communications to the FCC. 47 U.S.C. 151, 152, 153(a) and (c).

The scheme of complementary federal and state regulation results in some overlap in the case of equipment and facilities used for both interstate and intrastate communications, most notably terminal equipment (*i.e.*, telephones and other devices) connected to the end point of the telephone network. Conflicts between state and federal authorities were rare, however, until comparatively recently. Until the mid-1970s the FCC largely acquiesced in state tariff regulation of terminal equipment used for both interstate and local service. State commissions generally regulated terminal equipment as an adjunct to local exchange service, in the absence of any FCC assertion of a paramount federal policy. Most carrier offerings of terminal equipment thus were not subject to tariffs at the federal level.³

³There were some exceptions to the Commission's policy of not subjecting terminal equipment to federal tariffs, as, for example, in the case of a particular kind of terminal equipment that was primarily for interstate communications. *E.g.*, *Department of Defense v. General Telephone Co.*, 38 F.C.C. 2d 803 (1973), *aff'd mem., sub nom. St. Joseph Telephone & Telegraph Co. v. FCC*, 505 F.2d 476 (D.C. Cir.

In more recent years, FCC policies with respect to services and facilities used for both interstate and intrastate communications sometimes have come into conflict with state regulatory policies. In several instances of conflict, the FCC has asserted federal primacy over state regulation. The courts uniformly have upheld the FCC's assertions of paramount federal authority.⁴ In the particular case of terminal equipment used for both interstate and intrastate service, the Fourth Circuit on two occasions has affirmed the FCC's assertion of paramount jurisdiction to determine the terms and conditions for interconnection of the equipment to the network at the local exchange level. *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, cert. denied, 429 U.S. 1027 (1976) (*NCUC I*); *North Carolina*

1974) (table). The FCC also undertook to regulate certain practices and restrictions governing the use of terminal equipment where a federal interest was present, even though the equipment was offered primarily under state tariffs. *E.g.*, *Hush-A-Phone Corp. v. AT&T*, 22 F.C.C. 112 (1957), on remand from *Hush-A-Phone Corp. v. FCC*, 238 F.2d 266 (D.C. Cir. 1956). In addition, although federal tariffs generally did not set forth a discrete charge for terminal equipment, interstate ratepayers paid a part of the cost of that equipment as a result of the jurisdictional separations process. That process assigns to the federal jurisdiction a percentage of the cost of telephone company plant that is used indivisibly for interstate and intrastate calls. The assignment of part of this cost to the federal jurisdiction results in an addition to the charges ratepayers pay for interstate and foreign service. See *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). The jurisdictional separations process has been incorporated in the FCC's rules. See *In re Separations Procedures*, 26 F.C.C. 2d 248 (joint board recommendation), adopted, 26 F.C.C. 2d 247 (1970).

⁴*E.g.*, *New York Telephone Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976). Cf. *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *General Telephone Co. v. FCC*, 449 F.2d 846 (5th Cir. 1971).

Utilities Commission v. FCC, 552 F.2d 1036, cert. denied, 434 U.S. 874 (1977) (*NCUC II*).

2. In the *Second Computer Inquiry*, the Commission sought to adapt its regulatory policies to new and still developing conditions resulting from the convergence of telecommunications and data processing technologies and usage.⁵ Under the policies announced in the *Computer I* decision, the FCC will continue to regulate "basic" telecommunications services under tariff.⁶ "Enhanced" services⁷ will not be subjected to tariff regulation.

⁵The *First Computer Inquiry* was the FCC's initial effort to fashion policies to deal with this development. In that rulemaking, the FCC decided that its regulation in this field would turn on a distinction between communications services, which would be subject to common carrier regulation, and data processing services, which would not be subject to tariff regulation at all. Carriers could provide data processing services only through fully separated subsidiary corporations. *In re Computer Use of Communications Facilities*, 28 F.C.C. 2d 267 (1971), 34 F.C.C. 2d 557 (1972), aff'd in relevant part *sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973). The *Computer I* distinction required the FCC to make judgments in close cases as to whether particular "hybrid" services or facilities were communications or data processing services.

Technological developments soon resulted in "smart" terminal equipment with substantial data processing capabilities. It became increasingly difficult for the Commission to classify terminals as either communications or data processing under the 1971 rules. AT&T's proposal in 1975 to offer a sophisticated terminal device, the Dataspeed 40/4, persuaded the FCC of the need to revisit its rules governing common carrier offerings of data processing services. *In re AT&T (Dataspeed 40/4)*, 62 F.C.C. 2d 21 (1977), aff'd *sub nom. IBM Corp. v. FCC*, 570 F.2d 452 (2d Cir. 1978). See *In re Second Computer Inquiry*, 64 F.C.C. 2d 771 (1977).

⁶The FCC defined "basic" service as the offering of a "transmission pipeline" (84 F.C.C. 2d at 54), or "a pure transmission capability over a communication path that is virtually transparent in terms of its interaction with customer supplied information" (77 F.C.C. 2d at 420).

⁷"Enhanced" services are those which are "more than a basic transmission service" (77 F.C.C. 2d at 420). This includes most activities that would have been categorized as "hybrid" services under the 1971 rules.

With respect to terminal equipment, the FCC first considered whether to make a regulatory distinction between "basic" and "enhanced" terminals,⁸ but it ultimately decided to treat all "customer premises equipment" (CPE) alike by removing all such equipment from tariff regulation. The Commission found that the provision of CPE, which was a competitive activity involving carriers as well as unregulated suppliers, should not be considered a common carrier service subject to tariff-type Title II regulation, and it refused to allow carriers to continue offering CPE under tariff as part of a basic communication service (77 F.C.C. 2d at 435-447). The Commission explained that CPE is readily severable from basic telecommunications transmission service, that there are multiple vendors for most types of terminals, and that tariff regulation might inhibit effective competition. In addition, the "bundled" offering of terminals with basic service under a single tariff might hide cross-subsidies (*id.* at 438-447). The FCC reserved the right to reimpose regulation, under its "ancillary" jurisdiction, on common carriers' offerings of CPE (as well as enhanced services) if that were necessary to protect monopoly service ratepayers (84 F.C.C. 2d at 109).

3. In its *Computer II* decision the Commission declared that its action preempted state regulation of both CPE and enhanced services to the extent that such regulation would be inconsistent with the new federal policies (84 F.C.C. 2d at 103-104; 88 F.C.C. 2d at 523-524, 541-542). Preemption was necessary because the same facilities are used for both interstate and intrastate communications (77 F.C.C. 2d at 455-457). The federal policy could not work unless CPE

as well as other services dependent on, but different from, basic service (84 F.C.C. 2d at 54). Enhanced services and their regulation are not at issue in this Court.

⁸*In re Tentative Decision*, 72 F.C.C. 2d 358, 406-419 (1979).

(and enhanced services) were removed from tariff regulation at both federal and state levels (84 F.C.C. 2d at 103-104).⁹

4. The court of appeals affirmed (Pet. App. A-1 to A-47). The court first held that the FCC had acted reasonably and within its statutory authority in removing CPE and enhanced services from tariff regulation and subjecting them instead to its ancillary jurisdiction (*id.* at A-18 to A-33). The court then turned to the preemption question raised in the instant petitions.

The court of appeals recognized that the federal-state conflict arose because most CPE "is used interchangeably for both interstate and intrastate communication and has traditionally been subject to both state and federal regulation" (Pet. App. A-34). It agreed with the FCC that continued state tariffing of CPE would frustrate "the objectives of the *Computer II* scheme" (*id.* at A-35). The court noted that the "[c]ourts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal scheme" (*ibid.*; footnotes omitted).

⁹The jurisdictional separations procedures, under which the costs of CPE are allocated partly to the federal jurisdiction for ratemaking purposes (see note 3, *supra*), reinforced the need for a uniform policy. If carrier-provided, state-tariffed CPE were used for both interstate and intrastate calls, some part of the carrier investment in CPE might be allocated to the interstate jurisdiction, and interstate ratepayers might have to pay higher rates so as to provide a return on that part of the investment. This would frustrate the federal policy, enunciated in *Computer II*, of isolating CPE costs from the costs that monopoly service ratepayers cover in buying common carrier utility services.

The court of appeals observed that its decision was in accord with two leading Fourth Circuit cases that had upheld FCC preemption of "conflicting state regulations [that] would [have] impede[d] the Commission in its effort to fulfill its statutory duty" (Pet. App. A-37; see *id.* at A-36 to A-40, discussing *NCUC I* and *NCUC II*). The court rejected attempts to distinguish *NCUC I* and *II* on the ground that they did not involve preemption of state rate-making. First, the court stated that the FCC in this case was not setting rates for intrastate communications but was exercising "its direct authority to determine the regulatory treatment of CPE used for interstate communications" (*id.* at A-38). Here, as in the *NCUC* cases, "conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely" and must yield (*ibid.*). Second, the court said, the Communications Act itself "does not distinguish between authority over rates and authority over other aspects of communications" (*id.* at A-38 to A-39). Thus, "conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases" (*id.* at A-39).

The court of appeals also rejected arguments that the FCC could not preempt "by creating a vacuum of deregulation" (Pet. App. A-40). The court pointed out that although the FCC had discontinued Title II tariff regulation of CPE, "it has substituted a different, *affirmative* regulatory scheme through its ancillary jurisdiction" (*ibid.*; emphasis in original; footnote omitted). The court concluded that federal regulation " 'need not be heavy-handed' " in order to have a preemptive effect (*ibid.*, quoting *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982)).

Finally, the court of appeals declined to debate the wisdom of the FCC's policy as compared with policies some states might favor (Pet. App. A-40 to A-41). Its function on review, the court said, was to determine "whether the Commission had the statutory authority to adopt the policy it did and whether that policy is arbitrary or capricious or an abuse of discretion" (*id.* at A-41). Having concluded that the FCC acted within its authority and in a reasonable fashion, the court remarked: "our review of the wisdom of state preemption is at an end" (*ibid.*).

ARGUMENT

The FCC in this case ordered the "detariffing" of customer premises equipment used in interstate communications and declared that tariff-type regulation of that equipment by state commissions was preempted as conflicting with the federal policy. The detariffing decision—whose substantive validity is not directly challenged here—was within the Commission's statutory authority over interstate communications and was neither arbitrary nor capricious. Only last Term, in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, No. 81-750 (June 28, 1982), this Court emphasized that conflicting state laws may be preempted by valid federal regulations. The decision of the court of appeals upholding the FCC's *Computer II* rules is consistent with this Court's decision in *Fidelity Federal*, does not conflict with the decisions of any other court of appeals, and does not warrant further review.

1. In *Fidelity Federal*, this Court addressed the question whether a federal agency may adopt regulations that have the effect of displacing state law, in the absence of a specific congressional declaration of an intention to preempt. The Court held that a federal agency, acting within the authority delegated to it by Congress, may adopt regulations that

"have no less pre-emptive effect than federal statutes" (slip op. 11).¹⁰

Relying on *United States v. Shimer*, 367 U.S. 374, 381-383 (1961), the Court in *Fidelity Federal* explained that an agency that has been granted the discretion to accommodate competing public interest considerations may adopt regulations preempting state law even if there is no evidence of a specific congressional intention to preempt. "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law * * *." *Fidelity Federal*, *supra*, slip op. 11. On judicial review, therefore, the issue is not whether *Congress* intended to preempt state law, but whether the *agency*, in adopting regulations codifying its view of the public interest, intended to preempt state law, "and, if so, whether that action is within the scope of the [agency's] delegated authority." Slip op. 11-12.

In the present case, the FCC explicitly declared that its new rules and policies had the effect of preempting inconsistent state regulation (84 F.C.C. 2d at 103-104; 88 F.C.C. 2d at 523-524, 541-542). Accordingly, under *Fidelity Federal*, the proper focus of the reviewing court is on whether the Commission has the authority to adopt the policy at issue and whether that policy is arbitrary or capricious. The resolution of these issues by the court of appeals does not warrant review by this Court.¹¹ The decision below is in

¹⁰See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1979) (footnotes omitted) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause."); *Blum v. Bacon*, No. 81-770, (June 14, 1982), slip op. 13-14.

¹¹Indeed, we note that the instant petitions do not directly challenge the lawfulness of the FCC's regulatory policy for CPE. They challenge only the preemptive effect of that policy. But by conceding, in effect, the

accord with the decisions of other courts of appeals that have considered the preemption issue in similar contexts and have concluded that the FCC has authority to regulate terminal equipment used for both interstate and intrastate communications.

The leading cases recognizing the FCC's authority over dual-use terminal equipment are the Fourth Circuit's decisions in *NCUC I* and *II*. In those cases, the Fourth Circuit correctly held that, because the FCC has plenary statutory authority over interstate telecommunications (see 47 U.S.C. 151, 152(a), 153(a) and (e), and 201-205), the reservation to the states of authority over purely intrastate service and facilities in 47 U.S.C. 152(b) is no obstacle to FCC preemption of inconsistent state regulation of terminal equipment that is used for *both* interstate and intrastate communications.¹²

lawfulness of the FCC's substantive policy, petitioners inadvertently have undermined their preemption argument beyond restoration. As the court of appeals properly concluded (Pet. App. A-41), once it is determined that the FCC acted within its authority and reasonably in adopting its substantive policy, the inquiry into the preemption question is at an end. This analysis is consistent with this Court's holding in *Fidelity Federal* that preemption by agency action is effective if the agency meant to preempt and if its substantive action was within its delegated authority.

¹²The arguments of both petitioners (82-1331 Pet. 24; 82-1352 Pet. 11-16) to the effect that the FCC in *Computer II* extended the "*Shreveport* doctrine" (see *Houston, E. & W. T. Ry. v. United States*, 234 U.S. 342 (1914)) to telecommunications miss the point of preemption law. The FCC has not purported to regulate purely intrastate service, as the ICC did in the *Shreveport* case. Rather, the FCC has exercised its undisputed authority over interstate communications to adopt particular regulatory policies for terminal equipment used for interstate as well as intrastate telecommunications. Accordingly, both the Fourth Circuit, in the *NCUC* cases (see *NCUC I*, *supra*, 537 F.2d at 793; *NCUC II*, *supra*, 552 F.2d at 1047-1048), and the court of appeals below (Pet. App. A-37 to A-38 & n.99) properly rejected the *Shreveport* argument.

NCUC I, supra, 537 F.2d at 791, 793-795; *NCUC II, supra*, 552 F.2d at 1041-1042, 1045-1047.¹³

The State of Arkansas, *amicus curiae* in No. 82-1331, contends (Br. 6-7) that the Court should grant review to consider whether the FCC may preempt state law by "deregulating" and leaving a "regulatory vacuum." This contention is also answered by the decision in *Fidelity Federal*. There, the Federal Home Loan Bank Board had preempted state laws restricting "due-on-sale" clauses in loan instruments and instead had given financial institutions the option to include and enforce such clauses. This Court held that the fact that "the Board's regulation simply permits, but does not compel," the use of the clause does not make the conflict between federal and state policy any less real, because the enforcement of state laws forbidding the use of the clause would "deprive[] the lender of the 'flexibility' given it by the Board" (slip op. 12-13). Moreover, the Court concluded that the existence of state regulation in an area where the federal agency has decreed there should be none would place an obstacle in the way of the full implementation of the federal policy, resulting in a clear conflict between the federal and state regulatory schemes. Slip op. at 13-14, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and *Franklin National Bank v. New York*, 347 U.S. 373, 378 (1954).

¹³The *NCUC* cases also laid to rest the argument (see 82-1331 Pet. 24-25) that Congress, in 47 U.S.C. 221(b), intended to deprive the FCC of authority over terminal equipment used predominantly for intrastate communications. The Fourth Circuit held that this section was merely intended to permit state commissions to regulate local exchange telephone service in those few metropolitan areas that overlap state boundaries. *NCUC II, supra*, 552 F.2d at 1045; *NCUC I, supra*, 537 F.2d at 795 & n.11. The court of appeals in this case adopted the Fourth Circuit's reasoning with respect to Section 221(b) (Pet. App. A-39 to A-40).

Here, the FCC chose to exercise its ancillary jurisdiction and to allow the competitive market in terminal equipment to operate free from tariff regulation. As the court of appeals observed (Pet. App. A-40; footnotes omitted), there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction. It is clear to us that the *Computer II* regulations embody a comprehensive federal regulatory scheme, including rules governing the marketing of CPE by common carriers."¹⁴ Any state tariff regulation of CPE would clearly conflict with this federal regulatory scheme.¹⁵

2. The decision below does not conflict with the decision of any other court of appeals. Although the National Association of Regulatory Utility Commissioners (NARUC) contends (82-1352 Pet. 11-16) that the ruling below conflicts with the Fourth Circuit's *NCUC* cases, the court below actually followed *NCUC I* and *II* and relied upon them as "leading cases" with which its own decision was "in accord" (Pet. App. A-36 to A-40).¹⁶

¹⁴The court of appeals correctly pointed out that federal regulation "need not be heavy-handed in order to preempt state regulation" (Pet. App. A-40, quoting *New York State Commission on Cable Television v. FCC*, *supra*, 669 F.2d at 66. See also *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 768 (2d Cir. 1968), cert. denied, 441 U.S. 904 (1979). Cf. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773-776 (1947).

¹⁵The importance to the states of their "traditional state prerogatives" (see *Arkansas Amicus Br. 9*) is not a relevant factor in determining whether the federal decision overrides state law. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Fidelity Federal*, *supra*, slip op. 11, quoting *Free v. Bland*, 369 U.S. 663, 666 (1962).

¹⁶Indeed, on the issue of the applicability of Section 221(b), the court below specifically rejected its own prior analysis of that statute and adopted the Fourth Circuit's "more sound interpretation" (Pet. App. A-39 to A-40).

NARUC, however, claims to see a conflict because the FCC rules at issue in the *NCUC* decisions did not explicitly and directly preempt state ratemaking. On this basis, NARUC erroneously characterizes the *NCUC* cases as having determined affirmatively that Congress "preserved ratemaking authority over such CPE with the States" (82-1352 Pet. 11). In fact, in both *NCUC* decisions the Fourth Circuit affirmed federal preemption of certain aspects of state tariff regulation of CPE.¹⁷ Those decisions recognized that the states retained authority over local services and facilities that are "separable from and do not substantially affect the conduct or development of interstate communications." *NCUC I*, *supra*, 537 F.2d at 793. But the court held without reservation that the FCC has plenary authority over CPE that is used in interstate communications.¹⁸

In any event, as the court of appeals in this case pointed out (Pet. App. A-38), the FCC in *Computer II* did not purport to set rates for intrastate service or even for jointly

¹⁷The FCC rules at issue in the *NCUC* cases preempted state tariff restrictions on the use of customer supplied CPE. Preemption of those tariff restrictions thus was a curb on state tariff regulation. Moreover, to the extent that the use of non-telephone company CPE became more widespread as a result of the federal rule and its preemptive effect, the FCC rules involved in *NCUC I* and *II* had at least a potential effect on the charges for local service, which are at the heart of the state ratemaking power. The dissenting judge in *NCUC I* made clear his understanding of the scope of the federal preemption effected there (537 F.2d at 799):

As a practical matter, this assertion of federal primacy necessarily and directly affects the intrastate rates which may be charged, jurisdiction of which could not be more clearly reserved to the States.

¹⁸The decisions of the Fourth Circuit in the *NCUC* cases have been followed by the First, Second and District of Columbia Circuits. *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977); *New York Telephone Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

used CPE. To be sure, the Commission adopted policies regarding the regulation of such equipment and required its removal from tariffs. This surely may have an impact on state rate regulation, as did the actions affirmed in the *NCUC* cases. But the *Computer II* policy does not amount to a "Federal control of local telephone rates," as NARUC suggests (82-1352 Pet. 11). The states remain free to set rates for local telephone service. They may not include CPE as a part of that tariffed service, however, because the paramount federal policy requires otherwise.

NARUC nevertheless contends (82-1352 Pet. 11-12) that the *NCUC* cases permitted federal encroachment only on the states' regulation of interconnection, but left their rate-making powers intact. The court below properly disposed of this contention (Pet. App. A-38 to A-39; footnote omitted; emphasis original):

We fail to see any distinction * * * between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle in this case is precisely the principle that demanded state preemption in the *NCUC* cases. * * * In *Computer II* the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in *NCUC I* and *II*, the state regulatory power must yield to the federal.

In addition, the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Section 2(a) and (b) of the Act allocate federal and state authority with regard to both "*charges[and]. . . facilities.*" Therefore, conflicting federal and state regulations regarding dual use

CPE are no more acceptable under the Act when equipment rates are involved, as here, than when inter-connection policies are involved, as in the *NCUC* cases.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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APRIL 1983

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ALEXANDER STEVAS,
CLERK

Nos. 82-1331 and 82-1352

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**BRIEF FOR RESPONDENT AMERICAN
TELEPHONE AND TELEGRAPH COMPANY**

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April 1983

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QUESTION PRESENTED

Does the Federal Communications Commission have authority to preempt state regulation of telephone equipment, used interchangeably both for interstate and intrastate communication, insofar as state regulation would interfere with the FCC's lawfully adopted regulatory policies.*

*Affiliates of American Telephone and Telegraph Company are Cincinnati Bell, Inc., Southern New England Telephone Company, and Cuban American Telephone Company. AT&T has no parent company and no other subsidiary or affiliate except ones that are, directly or indirectly, wholly owned by AT&T.

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LOUISIANA PUBLIC SERVICE COMMISSION,
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FEDERAL COMMUNICATIONS COMMISSION and
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On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**BRIEF FOR RESPONDENT AMERICAN
TELEPHONE AND TELEGRAPH COMPANY**

Respondent American Telephone and Telegraph Company submits this brief in opposition to the petitions for certiorari.¹

STATEMENT

Petitioners seek review of the Federal Communications Commission's decision in the *Computer II* inquiry,²

¹ Petitioner in No. 82-1331 is the Louisiana Public Service Commission; petitioners in No. 82-1352 are the National Association of Regulatory Commissions, California, and its utility commission.

² *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 72 F.C.C.2d 358 (1979) (tentative decision), 77 F.C.C.2d 384 (final decision), 84 F.C.C.2d 50 (1980) (decision on reconsideration), 88 F.C.C.2d 512 (1981) (decision on further reconsideration), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

a lengthy proceeding in which the FCC reexamined its policies respecting telecommunication, related data processing activities, and customer premises equipment ("CPE") used in telecommunication.³ The petitions challenge a single aspect of the FCC's multifaceted *Computer II* decision, namely, its preemption of state regulatory authority insofar as state regulation would interfere with FCC policies for CPE used interchangeably in interstate and intrastate communications. This limited preemption was a reasonable exercise of the FCC's authority over interstate communication and is amply supported by judicial precedent; no conflict exists among the circuits or with any decision of this Court; and there is no reason for review on certiorari.

A. Pertinent Background

The *Computer II* decision—at issue in this case—superseded the FCC's earlier attempt, in *Computer I*,⁴ to establish a framework for regulating common carrier services related to data processing. Title II of the Communications Act of 1934 provides for comprehensive regulation by the FCC of interstate communication provided on a "common carrier" basis; and it permits, but does not require, more flexible regulation under Title I of other interstate communication.⁵ In *Computer I*,

³ CPE includes telephone and related equipment located on the customer's premises, ranging from ordinary telephones to complex PBX switchboards and data transmission devices.

⁴ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 291 (1970) (tentative decision), 28 F.C.C.2d 267 (1971) (final decision), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

⁵ Title I comprises provisions 47 U.S.C. §§ 151-55, and Title II comprises §§ 201-24.

responding to the interdependence between communication and computers that had developed by the 1960's, the FCC adopted final rules in 1971 for deciding which computer uses by common carriers it would consider common carrier communication subject to Title II and which it would regard as data processing services not subject to regulation.⁶

During the same period, the FCC in the 1960's "embarked on a conscious policy of promoting competition" (77 F.C.C.2d at 439) in the market for CPE. Such equipment is, almost without exception, used interchangeably for *both* interstate and intrastate communications. Such "dual use" equipment was therefore regulated in various facets by both federal and state agencies. Prior to 1968, CPE was normally provided solely by common carriers, and charges for it were included in tariffs filed with the FCC or state commissions.

This pattern was permanently altered following the FCC's 1968 *Carterfone* decision.⁷ Tariff changes made by the carriers after *Carterfone* opened the CPE market to independent, non-common carrier manufacturers and suppliers. Subsequently, in successive decisions reviewed in the Fourth Circuit, the FCC ruled first that the states could not restrict connection of customer-supplied CPE in conflict with carrier tariffs that were consistent

⁶ Under the Communications Act, a common carrier is free to provide services, whether communication or otherwise, that do not constitute common carrier offerings.

⁷ *In re Carterfone*, 13 F.C.C.2d 420, *reconsid. denied*, 14 F.C.C.2d 571 (1968). The FCC's decision in *Carterfone* did not deal with telephone instruments and other facilities furnished by telephone companies in providing telephone service. *Id.* at 572.

with the FCC's new policy of fostering CPE competition,⁸ and thereafter the FCC adopted technical registration requirements for CPE that preempted any contrary state regulations.⁹ In sustaining the FCC's preemptive authority, the Fourth Circuit emphasized "*the impossibility of separating interstate terminal equipment from local terminal equipment* [because] . . . the same telephones are used for both interstate and local communications."¹⁰ This Court denied petitions for certiorari in both cases.

During the 1970's, as the market for providing CPE became increasingly competitive, the nature of CPE also evolved due to technological developments. CPE still included the ordinary telephone, now obtainable from numerous competing suppliers, but it also came to embrace a great range of complex equipment located on customer premises, including highly sophisticated systems that utilize computer capability to provide communication service. Thus, by the mid-1970's, the original dividing line between regulated communication and unregulated data processing had become hopelessly blurred,¹¹ and CPE had become a competitive business rather than the preserve of common carriers.

⁸ *In re Telarent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*North Carolina I*).

⁹ *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593 (1975), *clarified*, 59 F.C.C.2d 83 (1976), *aff'd sub nom. North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*North Carolina II*).

¹⁰ *North Carolina II*, 552 F.2d at 1043 (emphasis added), discussing *North Carolina I*.

¹¹ An example is provided by the Dataspeed 40/4^R device, an item of CPE at issue in *IBM v. FCC*, 570 F.2d 452 (2d Cir. 1978). That device was a "complex of small machines with the cumulative capacity to send and receive messages from a central computer . . . [with] enhanced capabilities for storage, correction, and transmission of

B. The Computer II Inquiry

Against this background, the FCC in 1976 began its *Computer II* inquiry¹² in order to establish a regulatory program that would respond to the developments in data processing and communication that had overtaken *Computer I*. After five years of proceedings, the final decision in *Computer II* rendered in 1980 resolved a host of policy issues relating to FCC regulation and the terms on which common carriers could participate in data-related communication services and CPE. One aspect of the decision—the treatment of CPE—is alone relevant to this case.¹³

Recognizing that the line it had drawn in 1971 between regulated communication and unregulated data processing was no longer workable, the FCC in *Computer II* established a new regulatory line of demarcation. It determined that the provision of CPE should not be regarded as “common carrier communication” subject to Title II regulation and that the charges imposed for CPE should not be tarified or “bundled” with charges for “basic” transmission services. Relying on its general jurisdiction over equipment used in interstate communication,¹⁴ the FCC ordered that existing carrier tariffs for

data . . .” *Id.* at 454. Years of litigation were consumed in determining whether this device provided a regulated communication service or an unregulated data processing service.

¹² *Notice of Inquiry and Proposed Rulemaking*, 61 F.C.C.2d 103 (1976).

¹³ The petitions for certiorari do not challenge the two other major aspects of *Computer II*, namely, the treatment of enhanced services or the requirement that AT&T provide such services and CPE through a separate subsidiary.

¹⁴ As explained at p. 9 below, CPE constitutes “interstate . . . communication by wire” under the Communications Act’s definition, which includes “instrumentalities” and “apparatus” “incidental to such transmission.” 47 U.S.C. §§ 152(a), 153(a).

CPE be withdrawn from both the FCC and state agencies, so that all manufacturers and suppliers, common carriers or not, could compete on the same basis.

The FCC's decision respecting CPE reflected the increased competition in the CPE market that followed *Carterfone* and related subsequent decisions. 77 F.C.C.2d at 453. The FCC observed that non-carrier providers of CPE (who were never regulated under Title II) were successfully competing with carriers in the now-competitive CPE market:

"[T]here are hundreds of manufacturers and suppliers of modems, terminals, storage devices, front end processors, large and small central processing units, multiplexers, concentrators, and virtually innumerable related devices. . . . There are multiple vendors for almost any type of equipment desired, and consumers are free to select equipment that best suits their needs." 77 F.C.C.2d at 440.

The FCC found that, if charges for CPE provided by carriers continued to be tariffed and bundled into basic transmission rates, the customer's ability to choose among the large variety of CPE now available would be restricted and rates for interstate transmission services would be affected. It concluded that tariffing of carrier-provided CPE could not be justified:

"In the present environment in which CPE is marketed, we are hard pressed to proffer any statutory or public interest justification for rate regulation of carrier-provided CPE. . . . [T]he [tariff] regulation of carrier provided CPE has a negative effect on competition and the exercise of our responsibilities over rates consumers pay for interstate communication services." 77 F.C.C.2d at 441.

The FCC determined that, in order to provide consumers with the full benefits of a competitive CPE mar-

ket, carrier CPE should not be tarified either with the FCC or with the states. The FCC recognized that its new policy meant the preemption of conflicting state regulation, but it held that its actions were authorized by its power over interstate communication, which inevitably would be affected by the tariffing of CPE at the state level. 77 F.C.C.2d at 455-57. On reconsideration, the FCC reaffirmed this conclusion, noting that it was preempting state regulation of CPE "only to the extent that [it] . . . is at odds with the [*Computer II*] regulatory scheme" 84 F.C.C.2d at 103.

C. The Decision Below

Numerous parties sought review of the FCC's *Computer II* regime, challenging various aspects of the decision. On November 12, 1982, the District of Columbia Circuit upheld the FCC's decision in every respect, finding that it was a reasonable exercise of the FCC's authority within the scope of its power under the Communications Act. 693 F.2d 198. The court held that the FCC's decision that CPE is not common carrier communication subject to Title II regulation was "clearly supported." *Id.* at 210. The agency's decision to require that carrier CPE be unbundled and that CPE be detariffed was also held both reasonable and supported by the record. *Id.* at 211-13. The court approved without qualification the necessary result of these decisions—the preemption of state authority over CPE rates:

"The [FCC] asserts that preemption of state regulation is justified in this case because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE. We agree. Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting

state regulations must necessarily yield to the federal regulatory scheme." LPSC Pet. A-35 (693 F.2d at 214) (footnotes omitted).

Several of the many parties who participated in *Computer II* requested but were denied stays of the FCC's decision at different times. Implementation of the *Computer II* regime according to a schedule established by the FCC began in July 1980, when carriers became free to offer new CPE on a non-tariff basis. Effective January 1, 1983, carriers were required to offer new CPE on a non-tariff basis. Finally, "embedded" CPE (actually in service or in inventory on January 1, 1983), will have to be offered on a non-tariff basis after the FCC decides ancillary questions regarding conditions of transfer and other details.

REASONS FOR DENYING THE WRIT

The FCC permissibly established a new regulatory policy for dual-use CPE to promote the public interest through competition in the CPE market, and it lawfully prohibited state interference with that policy. Numerous cases sustain the FCC's jurisdiction over interstate communication service and facilities, its long-standing policy of introducing competition into the CPE market, and its preemptive authority with respect to dual-use CPE. There is no conflict between the circuits or with any decision of this Court and no other reason for further review in this case.

I. The Commission Acted Rationally and Within the Scope of Its Statutory Authority.

In determining whether a federal agency has properly preempted conflicting state law, the central question is whether the agency has acted "within the scope of [its] delegated authority." *Fidelity Federal Savings and Loan*

Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3023 (1982). The FCC's action clearly meets this test. The CPE affected by the FCC's preemption decision in this case is admittedly dual-use CPE which is used in interstate, as well as intrastate, communication. It therefore unquestionably falls within the FCC's broad jurisdiction over "all interstate . . . communication by wire" (47 U.S.C. § 152(a)), including "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication. 47 U.S.C. § 153(a).

Consistent with this grant of authority, the FCC has been regulating dual-use CPE since at least 1947, when it adopted rules for the connection of recording devices to telephone sets.¹⁵ The FCC has issued decisions affecting a variety of CPE used indiscriminately in both interstate and intrastate communications, including telephones in general,¹⁶ privacy devices attached to telephones,¹⁷ private exchange facilities,¹⁸ teletypewriter exchange service stations and supplemental equipment,¹⁹ and circuit restoration devices.²⁰

The FCC's regulation of dual-use CPE was not seriously challenged in the courts until the mid-1970's, when the FCC established its registration program for CPE. At that time, the Fourth Circuit, in two related opinions that

¹⁵ *In re Use of Recording Devices*, 11 F.C.C. 1033, 1046-48 (1947).

¹⁶ *Katz v. AT&T*, 43 F.C.C. 1328, 1332 (1953).

¹⁷ *Hush-A-Phone Corp. v. AT&T*, 22 F.C.C. 112 (1957).

¹⁸ *AT&T-Railroad Interconnections*, 32 F.C.C. 337, 339 (1962).

¹⁹ *AT&T-TWX*, 38 F.C.C. 1127, 1133 (1965).

²⁰ *Dept. of Defense v. General Telephone Co.*, 38 F.C.C.2d 803 (1973), *rev. denied*, FCC No. 73-854, *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co. v. FCC*, 505 F.2d 476 (D.C. Cir. 1974).

this Court declined to review,²¹ firmly endorsed the FCC's authority. The First, Second and District of Columbia Circuits followed suit, confirming the FCC's authority over a variety of dual-use CPE or other dual-use facilities.²² There is no conflicting decision in any circuit or in this Court.

In *Computer II* the FCC exercised its established authority to promote the public interest through increased competition. The FCC's policy of fostering competition in the CPE market is also a well established one that has been repeatedly upheld by the courts. Pertinently, it was implemented by the FCC's 1975 decision establishing federal registration requirements for CPE—a decision that the Fourth Circuit affirmed and this Court declined to review.²³ The regulatory decisions respecting CPE made in *Computer II* are simply another iteration of this basic policy.

The encouragement of competition in CPE is part of a broader FCC policy to promote the public interest through competition in various aspects of communications, a policy this Court has held may be pursued whenever the FCC finds that competition is "reasonably feasible" and "in the public interest." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94-96 (1953). Based on

²¹ *North Carolina Utils. Comm'n v. FCC*, *supra*, 552 F.2d 1036; *North Carolina Utils. Comm'n v. FCC*, *supra*, 537 F.2d 787.

²² *New York Telephone Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977).

²³ *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, *supra*, clarified, 59 F.C.C.2d 83, *aff'd sub nom. North Carolina Utils. Comm'n v. FCC*, *supra*, 552 F.2d 1036.

findings of public benefit, the FCC has implemented its competitive policy not only for CPE but also for intercity voice and data communications services. In the intercity area, its actions were explicitly approved by the Ninth Circuit, in a decision this Court declined to review, and also by the Third and District of Columbia Circuits.²⁴

Because dual-use CPE falls within FCC jurisdiction and the FCC's *Computer II* policy is rational, conflicting state regulation must give way under the Supremacy Clause of the Constitution. The FCC has well-established power to preempt state regulations that conflict with its own authorized regulatory policies for interstate communication. The FCC's power over dual-use CPE has been approved by every court of appeals that has considered it, and this Court has repeatedly declined to review such decisions.

The FCC's authority to preempt state authority over dual-use CPE was elaborately examined and affirmed in two Fourth Circuit decisions rendered in 1976 and 1977 (*North Carolina I* and *II*), and in both cases this Court denied certiorari. See p. 4, above. The Fourth Circuit's conclusion was subsequently followed by the First, Second and District of Columbia Circuits in decisions relating to the regulation of a variety of specific types of CPE or other communication facilities.²⁵

The specific exercise of the FCC's preemption power in this case was clearly proper. The FCC reasonably found

²⁴ *Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); *AT&T v. FCC*, 539 F.2d 767 (D.C. Cir. 1976).

²⁵ E.g., *Puerto Rico Telephone Co. v. FCC*, supra, 553 F.2d 694; *New York Telephone Co. v. FCC*, supra, 631 F.2d 1059; *California v. FCC*, supra, 567 F.2d 84.

that state tariffing of dual-use CPE would conflict with its policy of promoting customer choice in CPE: the interstate and intrastate uses of CPE cannot practically be distinguished, and a single regime was necessary unless consumers were to buy separate CPE for use solely in intrastate communications. 77 F.C.C.2d at 455-57 & n.74; 84 F.C.C.2d at 103-04. Finally, the FCC emphasized that:

"[W]e preempt the states here only to the extent that their terminal equipment regulation is at odds with the regulatory scheme set forth [in *Computer II*]. We do not assess here the legality under the Communications Act of future attempts by the states to regulate CPE in ways which they perceive to be consistent with this decision." 84 F.C.C.2d at 103.

II. The Decision Below Presents No Conflict and No Novel Issue.

The FCC's authority to preempt conflicting state regulation of dual-use CPE in the interest of promoting competition in the CPE market presents no conflicts among the circuits and no novel issues of law for this Court. The petitioners seek review of a question that has been examined in detail by four courts of appeals and uniformly resolved in favor of the FCC. Review would be justified only if this Court were prepared to reverse 15 years of agency practice and judicial decisions that, in response to changing technology, have revolutionized the telecommunications industry.

The legal arguments that petitioners urge were laid to rest over five years ago, when this Court twice declined to review the Fourth Circuit decision in *North Carolina I* and *II*. The issue arises because the Communications Act, while giving the FCC broad jurisdiction in Section 2(a), 47 U.S.C. § 152(a), over "all interstate and foreign communication by wire," reserves to the states in Section 2(b),

47 U.S.C. § 152(b), certain powers over instrumentalities used in intrastate communication. Section 2(b) states:

“[N]othing in this chapter shall be construed . . . to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier”

Petitioners argue that this provision precludes FCC jurisdiction over the rates for CPE used jointly in interstate and intrastate communication—a reading that would effectively deprive the FCC of power over dual-use CPE whenever (as here) it is not practicable to regulate separately its intrastate and interstate uses.

Contrary to petitioners’ argument, the courts have consistently adopted the view that when services or facilities fall within the federal ambit of Section 2(a), but also have intrastate uses, the FCC’s regulatory authority is preeminent over that of the states. The courts similarly have rejected petitioners’ reading of Section 2(b). In *North Carolina I*, the Fourth Circuit explicitly found that Section 2(b) only deprived the FCC of jurisdiction “over local services, facilities and disputes that . . . are *separable from and do not substantially affect* the conduct or development of interstate communications,” 537 F.2d at 793 (emphasis added), and the court specifically rejected the notion that “section 2(b) sanctions any state regulation . . . that in effect encroaches substantially upon the [FCC’s] authority” *Id.* This decision was reaffirmed in *North Carolina II*:

“*North Carolina I* correctly reasoned that if section 2(b)(1) were construed to give the states primary authority over joint terminal equipment, *i.e.*, equipment used interchangeably for interstate and intrastate service, then—whenever state regulations

conflicted with federal rules applicable to interstate calls—the FCC would necessarily be prevented from discharging its statutory duty under sections 1 and 2(a) to regulate interstate communication.” 552 F.2d at 1045.

This Court denied certiorari in both *North Carolina* cases, and the *North Carolina* construction of Sections 2(a) and 2(b) has subsequently been followed by the First, Second and District of Columbia Circuits. See p. 10, above.

A decade of FCC regulation is premised upon this uniform construction of Sections 2(a) and 2(b). An entire new and competitive CPE industry now rests upon the FCC’s preemptive authority, exercised in the registration program and now in the *Computer II* decision. Successive circuit court decisions have reinforced rather than questioned the Fourth Circuit’s reading. At this stage, any revamping of the statutory plan should come from Congress and not through judicial disturbance of a settled construction.

NARUC mistakenly suggests that the *North Carolina* cases can be distinguished because the states’ ratemaking authority is affected in this case. But Sections 2(a) and 2(b) speak of “rates” and “facilities” in precisely the same terms and do not restrict FCC preemptive power as to the former any more than as to the latter. Indeed, state rate tariffs were directly affected by the FCC action upheld in *North Carolina II*.²⁶ A parallel argument, seeking to distinguish “services” from “facilities,” was explicitly rejected by the District of Columbia Circuit in

²⁶ That decision compelled the telephone companies to make their state-filed protective connecting arrangement tariffs inapplicable to registered CPE.

California v. FCC, after which this Court again denied certiorari. See p. 10, above. Finally, in the *New York Telephone* case, the Second Circuit sustained FCC preemptive authority as applied in a case that unquestionably involved state rate regulation. See 631 F.2d at 1061.

Taking a different tack, the Louisiana Public Service Commission suggests that preemption by a federal agency is somehow more suspect than preemption by Congress, and that an agency cannot preempt state regulations in furtherance of policies not imposed by statute.²⁷ But this argument was disposed of by this Court at least twenty years ago, in *United States v. Shimer*, 367 U.S. 374, 381-82 (1961), and again only last term in *de la Cuesta*,²⁸ when the Court reaffirmed the power of agencies to preempt state law through regulations:

"Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

* * * *

A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations

²⁷ The argument appears to be that the decision to detariff CPE is part of a "self-generated" policy of "deregulation" that is not expressed in the Communications Act and that therefore cannot be imposed on the states through preemption, because "an express or implied Congressional directive is necessary for the preemption of state law." LPSC Pet. 17-18.

²⁸ *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, *supra*, 102 S. Ct. 3014. Accord, *Blum v. Bacon*, 102 S.Ct. 2355 (1982).

which did not disturb state law is not dispositive.”
102 S.Ct. at 3022-23.

This Court expressly held that the only questions to be considered when state regulation appears to conflict with federal agency regulation are whether the agency meant to preempt state law and, if so, whether preemption was “within the scope of [the agency’s] delegated authority.” *Id.* at 3023.

In *de la Cuesta*, the Court held that a Federal Home Loan Bank Board regulation permitting use of “due-on-sale” clauses in mortgage contracts written by federal savings and loan associations preempted contrary state law. The Board’s enabling statute, like the Communications Act, contained a general grant of authority, and the Board, like the FCC here, had made clear its intent that the regulation preempt any contrary state law. Yet, while the Communications Act explicitly gives the FCC power over “charges” for equipment used in interstate communications, the Board’s statute made no mention of due-on-sale clauses. Because the FCC’s action here rests on an even sounder footing, this Court’s approval of the Board’s preemptive action effectively disposes of LPSC’s argument.

Over a decade ago, Chief Justice Burger, then a circuit judge, rejected a different attempt to use Section 2(b) to frustrate effective FCC regulation of CATV, observing:

“Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.”²⁹

²⁹ *General Telephone Co. of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

Those words apply with even greater force to the regulation of CPE used interchangeably for interstate and intrastate communication. They resolve this case.

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

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April 1983

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APR 15 1983

Nos. 82-1331 & 82-1352

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
v. *Petitioner,*
FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, *et al.,*
v. *Petitioners,*
FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

On Petitions for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION IN OPPOSITION**

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Communications Commission acted within its established authority when it decided to detariff customer premises equipment connected to the interstate telecommunications network and used jointly in interstate and intrastate communications even though this action effectively displaces inconsistent state regulation.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed:

Aeronautical Radio, Inc.
Alabama Public Service Commission
Alarm Industry Telecommunications Committee of
the National Burglar Fire Alarm Association
American Business Press, Inc.
American Newspaper Publishers Association
American Petroleum Institute
American Telephone and Telegraph Company
Association of Data Processing Service
Organizations, Inc.
Bunker Ramo Corporation
Central Telephone Utilities Corporation
Citicorp
Computer and Business Equipment Manufacturers
Association
Communications Satellite Corporation
Comsat General Corporation
Continental Telephone Corporation
Central Data Corporation
Datapoint Corporation
Department of Public Service of the State
of Minnesota

Department of Public Utility Control Authority of
 the State of Connecticut
 Federal Communications Commission
 Henry Geller
 GTE Service Corporation
 GTE Telenet Communications Corporation
 Hazeltine Corporation
 Honeywell, Inc.
 Independent Data Communications
 Manufacturers Association, Inc.
 IBM Corporation
 ISA Communications Services, Inc.
 Louisiana Public Service Commission
 The Maine Public Utilities Commission
 MCI Telecommunications Corporation
 Motorola, Inc.
 Municipality of Anchorage d/b/a Anchorage
 Telephone Utility
 National Association of Regulatory Utility
 Commissioners
 National Newspaper Association
 New York State Consumer Protection Board
 North American Telephone Association
 Office of Consumers Utility Counsel, State of Georgia
 Office of People's Counsel of Maryland
 Oklahoma Corporation Commission
 The People of the State of California and the Public
 Utilities Commission of the State of California
 Public Advocate of Delaware
 The Public Service Commission of Wisconsin
 RCA Global Communications, Inc.
 Satellite Business Systems
 Southern Pacific Communications Corporation
 Sperry Univac Division of Sperry Corporation
 State of Arkansas
 The State Corporation Commission of the
 State of Kansas
 Tymnet, Inc.
 United Computing Systems, Inc.

United States Department of Justice
 United Telephone Systems, Inc.
 U.S. Telephone and Telegraph Corporation
 Utilities Telecommunications Council
 Western Union Telegraph Company
 Wisconsin Telecommunications Contractors
 Association
 Xerox Corporation

In light of the purposes of Rule 28.1, we construe the terms "parent companies", "subsidiaries" and "affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies", which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates", a majority of whose shares are owned by a party.

The member companies (or corporate parents of affiliates of member companies) of the Computer and Business Equipment Manufacturers Association that are publicly traded in the United States are as follows: 3 M; AMP Incorporated; Apple Computer Inc.; Bell & Howell, Phillipsburg Division; Burroughs Corporation; Control Data Corporation; Pitney Bowes (whose subsidiary Dictaphone Corporation is also a member company); Digital Equipment Corporation; EXXON (whose division, EXXON Enterprises, is the member company); Eastman Kodak Company; GF Business Equipment, Inc.; General Binding Corporation; GenRad, Inc.; Hewlett-Packard Company; Honeywell, Inc. (whose divisions, Honeywell Information Systems, Inc. and Micro Switch, are the member companies); IBM Corporation; Lanier Business Products, Inc.; NCR Corporation; North Star Computer, Inc.; Phillips Business Systems, Inc.; Prime Computer, Inc.; Sanders Associates, Inc.; Sperry UNIVAC; TRW, Incorporated; Tektronix, Inc.; Texas Instruments Incorporated; and Xerox Corporation.

The following member companies of the Computer and Business Equipment Manufacturers Association are ei-

ther not publicly owned or are affiliated with or owned by companies that are not publicly traded in the United States: Acme Visible Records, Inc.; Contitronix, Incorporated; ICL, Incorporated; Docutel/Olivetti Corporation; Sony Corporation of America; The Standard Register Company; Lexor Corporation; Multigraphics, a Division of AM International, Inc.; Panasonic Industrial Company; Quality Micro Systems, Inc.; Royal Business Machines, Inc.; Topaz, Inc.; and UARCO Incorporated.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1331

LOUISIANA PUBLIC SERVICE COMMISSION,
v. *Petitioner,*

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

No. 82-1352

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, *et al.,*
v. *Petitioners,*

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

**On Petitions for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION IN OPPOSITION**

Respondent Computer and Business Equipment Manufacturers Association ("CBEMA") respectfully requests that this Court deny the Petitions for Writ of Certiorari filed herein on February 9 and 10, 1983, by the Louisiana Public Service Commission and the National Association of Regulatory Utility Commissioners, *et al.*, respectively, seeking to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 12, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 693 F.2d 198. The court's opinion appears in the Appendix to the Petition of the Louisiana Public Service Commission at pp. A-1 - A-47.¹

The administrative orders constituting the *Computer II*² decision consist of the Commission's *Final Decision*, 77 FCC 2d 384 (1980) ("Final Decision"), released May 2, 1980, and its *Memorandum Opinion and Order on Reconsideration*, 84 FCC 2d 50 (1980) ("Reconsideration Order") released December 30, 1980. Those orders also refer to and rely on a *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979) ("Tentative Decision"), released July 1, 1979. On October 30, 1981, the Commission also released a *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512 (1981) ("Second Reconsideration Order").

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Sections 151 and 152 of the Communications Act of 1934, 47 U.S.C. §§ 151 and 152, as amended, appear in an Appendix hereto.

¹ Hereinafter, the Appendix to the petition of the Louisiana Public Service Commission containing the opinion of the court of appeals will be cited as "Pet. App. at —."

² *Computer II* is a short-hand reference commonly used throughout the long history of an FCC rulemaking proceeding entitled "In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)."

STATEMENT OF THE CASE

A. The Commission's Computer II Decision

In the words of the court of appeals, "[r]esponding to monumental changes in the technological and economic conditions of the communications marketplace, the Commission in *Computer II* overhauled the regulatory regime governing the interrelationship of telecommunications and data processing." Pet. App. at A-10, 693 F.2d at 202.³

At the heart of *Computer II* are the policies adopted respecting customer premises equipment ("CPE"),⁴ "basic" transmission services, and "enhanced" services⁵—with

³ The Commission first addressed the regulatory and policy problems posed by the growing interdependence of data processing and communications in a proceeding commenced in 1966 (*First Computer Inquiry or Computer I*). See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 FCC 2d 291 (1970) ("Tentative Decision"); 28 FCC 2d 267 (1971) ("Final Decision"), *aff'd, in part, sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).

⁴ CPE is defined by the Commission as including all equipment provided by common carriers and located on customer premises *except* over voltage protection equipment, inside wiring (to effectuate connections with the transmission network), coin operated or pay telephones, and multiplexing equipment to deliver multiple channels to the customer. *Reconsideration Order*, 84 FCC 2d at 61. As such, CPE includes such devices as the common residential telephone, computer terminals, answering devices, and private branch exchanges (PBXs).

⁵ "Basic" service is defined by the Commission as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Final Decision*, 77 FCC 2d at 420. "Enhanced" services are defined as a residual category: "[a]n enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* Examples of "enhanced services" include information services such as those which provide stock market quotations, legal data retrieval, current real estate listings, and the Dow Jones news services.

CPE and enhanced services being segregated from the scope of traditional common carrier regulation under Title II of the Communications Act.

The subject petitions are directed to that portion of the *Computer II* decision which removes from tariff regulation all CPE used for interstate communications. Thus, whereas CPE has, in recent years, been supplied by both unregulated equipment vendors (on an untariffed basis) and common carriers (under tariff, as part of their basic communications package), *Computer II* will permit carriers to continue to offer CPE only as a non-tariffed item. *Final Decision*, 77 FCC 2d at 435-47. The Commission's rationale for this particular regulatory measure was as follows: CPE is readily severable from basic utility service, there are multiple vendors for most types of terminals today, tariff regulation might inhibit effective competition, and the continued "bundled" offering of terminal equipment with basic service (by common carriers) might facilitate harmful cross subsidies and disguise the true cost elements of a complete service. *Final Decision*, 77 FCC 2d at 438.

Having thus found that the carriers' historical practice of packaging CPE with transmission service and offering the package for a bundled, tariffed rate impeded competition and adversely affected communications users, the Commission accordingly concluded that "the objectives of the Communications Act would best be fulfilled by deregulating all CPE." *Reconsideration Order*, 84 FCC 2d at 98. As the Commission clearly recognized, this aspect of its decision effectively precludes states from regulating, as they have in the past, the charges for terminal equipment used jointly in the provision of intrastate and interstate services: "Divided regulation of equipment charges is not feasible if the equipment charges are unbundled from both interstate and intrastate services." *Final Decision*, 77 FCC 2d at 455. It is this preemptive effect that is the focal point of the pending petitions before this Court.

B. The Court Of Appeals Decision

On appeal under 47 U.S.C. § 402(a) (1976), the court of appeals unanimously⁶ affirmed the Commission's decision in all respects.

On the preemption issue, the court found that continued state tariffing of CPE would severely frustrate the objectives of the overall *Computer II* scheme and must, as such, yield to the federal regulatory program:

"Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."⁷

Moreover, "[g]iven the Commission's detailed and logical findings on this point,"⁸ the court declined to be drawn into a policy-making role of its own. Rather, it said:

"We cannot engage in debate about whether a policy of price control through tariffing or a policy of free competition best serves the public interest in this area. All we are empowered to do is to determine whether the Commission had the statutory authority to adopt the policy it did and whether that policy is arbitrary or capricious or an abuse of discretion. We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capricious, nor

⁶ Circuit Judge Edwards did not participate in the final disposition of the case. Pet. App. at A-9, 693 F.2d at 202.

⁷ Pet. App. at A-35, 693 F.2d at 214 (citations omitted).

⁸ *Id.*

an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.”⁹

On February 9, 1983 and February 10, 1983, respectively, the Louisiana Public Service Commission (“LPSC”) and the National Association of Regulatory Utility Commissioners, *et al.* (“NARUC”), petitioned this Court for a writ of certiorari to review the decision of the court of appeals with respect to the preemption issue only.

ARGUMENT

The regulatory program initiated by *Computer II* involves a number of vital and interrelated issues affecting our national telecommunications system. The Commission and the court of appeals have rendered comprehensive and dispositive opinions on all of those issues. Petitioners in this Court attack the resolution of but one issue—whether state regulation of CPE used in both interstate and intrastate communications must yield to the overall federal regulatory program.¹⁰

⁹ Pet. App. at A-40 - A-41, 693 F.2d at 217.

¹⁰ The practical conflict arises in this case because most CPE is connected to the interstate telephone network and used interchangeably for both interstate and intrastate communications. Moreover, the Communications Act gives both the federal government and the states certain authority with respect to communications. First, Section 2(a) gives the FCC jurisdiction over “all *interstate and foreign communication* by wire or radio and . . . [over] all persons engaged within the United States in such communication” At the same time, Section 2(b) reserves to the states jurisdiction with respect to “charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service*. . . .” 47 U.S.C. §§ 152(a), (b) (1976) (emphasis added). Taken together, the two provisions establish that the Commission has authority over all interstate communications and the states have authority over purely intrastate communications—but they do not, on their face at least, resolve the question of ultimate authority when interstate and intrastate communications are, as here, not severable. Rather, as the remaining text demonstrates, that question has been definitively settled by longstanding judicial precedent.

Petitioners fail to present any persuasive reasons why the decision below should be reviewed by this Court. The court of appeals decision is fully consistent with general principles of federal preemption established by prior decisions of this Court, no other important question of federal law is presented, and there is no conflict within the circuits on the question raised. Indeed, the sole question urged by Petitioners—whether Section 2(b) of the Communications Act precludes the Commission from preempting state regulation of dual-use CPE—has been uniformly and correctly resolved in the Commission’s favor in all the circuits where the question has been addressed.

I. THE DECISION BELOW COMPORTS FULLY WITH THE APPLICABLE STATUTORY SCHEME AND DECISIONS OF THIS COURT CONCERNING FEDERAL PREEMPTION

The decision of the court of appeals is consistent with applicable decisions of this Court and reflects both the policies of the Communications Act and the direct application of settled law governing federal-state relationships under circumstances where federal and state regulations are inconsistent.

A. The Statutory Framework

Congress intended that the interstate communications network be subject to strong national control and it gave the FCC expansive powers to assert that control. Thus, the FCC serves as “the single Government agency” with “unified jurisdiction” and broad regulatory authority over all forms of electrical communication.¹¹ Moreover, it “is confirmed by the language of the statute and by judicial decisions” that the Communications Act contemplates the

¹¹ *U.S. v. Southwestern Cable*, 392 U.S. 157, 168 (1968) (citations omitted).

regulation of interstate communications "from its inception to its completion" at the ultimate destination.¹²

In particular, the Act directs the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges" 47 U.S.C. § 151. The grant of jurisdiction covers not only the transmission of interstate and foreign communications, but also "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C. § 153(a) and (b). This basic authorization to determine what array of facilities is "adequate" or most "efficient," and what level of pricing is "reasonable," leaves the Commission a wide range of options in giving content to the overall statutory policy.¹³

Inextricable to the exercise of such broad powers is the ability to develop (as well as alter) federal communications policy responsive to changing conditions. As this Court observed in construing a similar statutory scheme involving the Interstate Commerce Commission:

"In fact, . . . this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. [T]hey are

¹² *U.S. v. AT&T*, 57 F.Supp. 451, 454 (S.D. N.Y. 1944), *aff'd*, *Hotel Astor, Inc. v. United States*, 325 U.S. 837 (1945).

¹³ As we are reminded by this Court, the "Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation." *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956). As such, the FCC's authority is not limited "to those activities and forms of communication that are specifically described by the Act's other provisions." *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968).

supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."¹⁴

B. The Federal Preemption Doctrine

The preemption doctrine is rooted in the Supremacy Clause, U.S. Const., Art. VI, cl. 2. As this Court's recent *Fidelity Federal* decision emphasizes, "preemption may be either express or implied".¹⁵ It may be compelled by explicit statutory language or it may be implicitly contained in the basic purpose and overall structure of the legislation.¹⁶

Moreover, even where, as here, "Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."¹⁷ Such a conflict arises where "compliance with both federal and state regulations is a physical impossibility"¹⁸ or where state law "stands as an obstacle to the accomplishment and execution of the full purposes

¹⁴ *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967). See also *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1049 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

¹⁵ *Fidelity Federal S. & L. Ass'n v. de la Cuesta*, — U.S. —, 73 L. Ed. 664, 675 (1982).

¹⁶ *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

¹⁷ *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Accord, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) ["Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict"].

¹⁸ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (hereinafter "*Florida Lime*").

and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).¹⁹

C. Petitioners Ignore The Central Purpose Of The Act And Misconstrue The General Principles Of Federal Preemption

In mounting their verbal attack over old terrain, Petitioners are necessarily forced into a highly constricted view of the Commission's authority under the Communications Act and a uniquely novel perception of the federal preemption doctrine. Neither view is supported by the cases.

Initially, Petitioners contend that the Commission may not formulate any federal telecommunications policy which effectively preempts state regulatory powers without express Congressional direction.²⁰ Thus, according to

¹⁹ Regulations promulgated by federal agencies like the FCC "have no less pre-emptive effect than federal statutes." *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. Accord, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *Free v. Bland*, 369 U.S. 663, 668 (1962).

²⁰ Indeed, LPSC's hyperbole on this point is seemingly boundless. In an effort to belittle what it perceives as the "self-generating determination of federal policy by an administrative agency," LPSC suggests that, wholly apart from its preemptive effect on state authority, the Commission simply cannot initiate any federal telecommunications policy without explicit or implicit statutory direction. LPSC Pet., p. 17. Not surprisingly, LPSC cites no judicial authority to support its proffered theory of administrative law. The suggestion, in fact, flies in the face of the entire regulatory regime which, as shown, establishes only a broad framework that affirmatively requires the Commission to "generate" and alter telecommunications policy to meet new and changing conditions. See cases cited at note 14, p. 9, *supra*. LPSC's view of the statutory scheme is, in fact, the very antithesis of the policy rationale for administrative agencies—i.e., "the ability to tailor broad legislative directives to fit specific problems. . . ." *North Carolina Utilities Commission v. FCC*, *supra*, 552 F.2d at 1049. If accepted, LPSC's view of the administrative process would virtually eviscerate the FCC's legitimate and necessary policymaking role.

LPSC, "[b]efore preemption by an administrative agency will be approved, the agency must show that each element of its action furthers a Congressional objective."²¹ LPSC relies upon this Court's *Florida Lime* decision, arguing that it bars preemption "unless (1) the nature of the regulated subject matter permits no conclusion except that Congress intended preemption, or (2) in explicit terms, the 'Congress has unmistakably so ordained.'" LPSC Pet., p. 19.²²

In urging this interpretation, LPSC conveniently side-steps the broad statutory power that is entrusted to the Commission to develop and implement a strong interstate communications system. (We discuss this at somewhat greater length in Section II, *infra*.) More pointedly here, however, LPSC simply misses the central holding of *Florida Lime*—a case involving a conflict between federal and California state standards governing the marketing of avocados.

As a prelude to deciding whether the State of California could constitutionally reject avocados which the U.S. Secretary of Agriculture (using a less restrictive standard) had certified to be marketable, the Court in *Florida Lime* emphasized that its ultimate conclusion depended upon whether, as a practical matter, the state regulation stood as a barrier to "the accomplishment and execution of the full purposes and objectives of Congress." 373 U.S. at 141, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). Employing that precise test—not the one re-constructed by LPSC—the Court held

²¹ LPSC Pet., p. 18. Stated somewhat differently, Petitioner NARUC argues that the court below has sanctioned the creation of a new jurisdictional framework which "lacks the requisite Congressional stamp of approval. . . ." NARUC Pet., p. 16.

²² Amici also principally rely on *Florida Lime*. See Amicus Curiae Briefs of Maryland Office of People's Counsel (p. 3) and the State of Arkansas and the Arkansas Public Service Commission (p. 6).

that the California regulation was not an obstacle to the federal program—because there was neither any actual conflict between the two schemes of regulation nor evidence of a congressional design to preempt the field. 373 U.S. at 141.

Accordingly, the factor that most clearly distinguishes *Florida Lime* from this case—and, in turn, makes the decision below fully consistent with *Florida Lime*—is the Court's focus in *Florida Lime* on whether or not the state and federal regulations could stand side by side. Expanding upon this point, the Court in *Florida Lime* noted that the "test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field. . . ." 373 U.S. at 142. In a statement that bears directly upon the instant case, the Court then concluded:

"A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."²⁸

In other words, contrary to LPSC's contentions, it is not even necessary to turn to the question of whether Congress ordained that the state regulation shall yield "unless it is first determined that" there is no "irreconcilable conflict" between the state and federal regulations. 373 U.S. at 146.

In the Communications Act, Congress envisioned a uniform and strong national communications system. While the Act recognizes the legitimate rate-making role of the states with respect to purely intrastate matters, the paramount objective is the provision of a "rapid, efficient,

²⁸ 373 U.S. at 142-43.

Nation-wide" communications service.²⁴ Thus, a critical characteristic of telecommunications in this country is its essential universality; and, as to the particular matters under consideration here, it simply is not possible to meet the national policy objectives of the Communications Act in the face of conflicting federal and state standards. To phrase the matter differently, a nationwide policy designed to govern the provision of CPE simply cannot be implemented if individual states are permitted to impose regulations that would directly thwart the federal regulatory program.

As such, here, where the decision involves customer premises equipment to be interconnected with the *inter-state* telecommunications system, there is, indeed, an "irreconcilable conflict" between federal and state regulatory objectives. Having decided after an exhaustive decade-old proceeding that unregulated competition in the provision of CPE would best serve the objectives of the Act by promoting more efficient use of the interstate communications network, the FCC determined that state tariffing of CPE would directly undermine and frustrate the achievement of these objectives.

In sum, the Commission found that "unless there were two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any

²⁴ 47 U.S.C. § 151. See also *General Telephone Co. of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969) ["fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication"]. Legislative history also clearly indicates that Congress intended to create an effective federal commission, one capable of implementing a unified national communications policy unhampered by potentially conflicting local policies. See, e.g., 78 Cong. Rec. 8822 (1934) (Remarks of Senator Dill).

other result by the states." *Final Decision*, 77 FCC 2d at 455.²⁵ To hold otherwise would, in effect, give the states a "veto" power over the development and implementation of national telecommunications policy.

Accordingly, rather than being in conflict with preemption principles articulated by this Court in *Florida Lime* and other cases,²⁶ the decision below is fully consistent with those principles. As this Court declared in *Florida Lime*, "[a] holding of federal exclusion of state law is inescapable" where, as here, compliance with different federal and state regulatory schemes would be a "physical impossibility." 373 U.S. 142-43. Obviously, a carrier or other entity engaged in interstate commerce could not offer customer premises equipment to be utilized in connection with the national telecommunications system on an unregulated, untariffed basis (pursuant to federal policy) while providing the same equipment under tariff (pursuant to contrary state regulation). It would be physically impossible.

²⁵ That this condition presents an "irreconcilable conflict" is, therefore, self-evident. The FCC's policy of detariffing CPE would have minimal effect if it extended only to that CPE which had been offered in federal tariffs. Most CPE, while typically used in both interstate and intrastate communications, has traditionally been offered in state tariffs. In any event, the FCC's policy determination was that tariff requirements (whether federal or state) would frustrate the pricing flexibility, innovation, freedom of entry, and vigorous competition that the agency sought to promote in *Computer II*. Moreover, continued tariffing at the state level would perpetuate the opportunities for hidden subsidies and price discrimination that the FCC sought to eliminate by unbundling and detariffing CPE. In sum, state regulation of the identical terminal equipment the FCC has deregulated presents a classic jurisdictional clash that, under both the Communications Act and general principles of federal preemption, must be resolved in the FCC's favor.

²⁶ See pp. 9-10, *supra*.

II. THE DECISION BELOW IS ALSO FULLY CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS

Congress created the Federal Communications Commission in 1934 to expand and enhance *interstate* communications. While the Commission's jurisdiction does not extend to matters purely *intrastate*, the clear thrust of the Act is to give the Commission the predominant role in ensuring the nation's communications needs.

Throughout the nearly fifty years this regulatory scheme has been in place, certain conflicts have inevitably arisen between federal and state regulation. When they have, the courts have consistently construed Sections 2(a) and (b) of the Act to give the FCC authority over facilities used in both interstate and intrastate communications—principally because, in practice, it is often impracticable to separate communications services and equipment along discrete inter- and intra-state lines.

Seeking to dispute or avoid this unmistakable precedent, Petitioner NARUC engages in a highly strained effort to find a conflict between the District of Columbia Circuit in this case and the Fourth Circuit in two interrelated cases decided in the mid-1970's. Upon examination, however, it is clear that not only is there not a conflict between the D.C. Circuit and the Fourth Circuit in the specific cases relied upon by NARUC, but no other circuit court decision is in conflict with the decision below. This absence of any conflict among the circuits—reflected, in fact, in long-followed consistent judicial decision—provides additional strong support for this Court not to grant plenary review.

Significantly, even NARUC is forced to acknowledge that the decision below is not “a case of first impression”—because, in its own words, the “Fourth Circuit has twice exhaustively examined the same issue.” NARUC

Pet., p. 11. It is also significant that the court below regarded its own analysis of the preemption issue as being in full "accord" with what it characterized as "two leading cases . . . which . . . recognized that state regulation which impedes a federal regulatory goal must yield to the federal scheme." Pet. App. at A-36, 693 F.2d at 214. Those cases are the same cases NARUC now claims are in conflict with the decision below—*North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*) and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) (*NCUC II*).

It is evident, therefore, that in order to paint a conflict between the decision below and the *NCUC* cases, NARUC must take a decidedly unique view of what the *NCUC* cases, in fact, held. It is a view that cannot be sustained—contrived only to meet one of the leading tests of this Court for granting review.

In general, the *NCUC* cases established the right of telephone subscribers to interconnect their own terminal equipment with the national telephone network—pursuant to a federal policy and equipment registration program formulated by the Commission in the mid-1970's to enhance competition in the terminal equipment market.²⁷ Despite this federal policy permitting interconnection of terminal equipment, several state regulatory commissions sought to forbid interconnection of non-carrier-supplied terminal equipment with local exchanges—except where such equipment was used exclusively for interstate communication. Because "separation of terminal equipment used exclusively for local communication is a practical

²⁷ Terminal equipment and customer premises equipment (CPE) are essentially synonymous terms—comprising, for purposes of both the *NCUC* cases and the instant case, such devices as the ordinary telephone, data sets, answering devices, key systems, PBX's and computer terminals.

and economic impossibility, the proposed state rules would have scuttled the [new] federal interconnection policy." *NCUC II*, 552 F.2d at 1043. Accordingly, the Fourth Circuit upheld the Commission's preemptive authority to determine the terms on which consumers may attach non-carrier supplied CPE to transmission facilities used for both interstate and intrastate communications—recognizing, in the same fashion as the court below, that state regulation which impedes a federal regulatory goal must yield to the federal scheme.

Nevertheless, in attempting to build a distinguishing wedge between the *NCUC* cases and the decision below, NARUC claims that the former specifically limited the Commission's preemptive power to the terms surrounding the offering of equipment and facilities—but not to rates, apparently assuming that rates are always a divisible element of equipment and facilities. Thus, in NARUC's view, the D.C. Circuit goes beyond the *NCUC* cases because it approves a Commission order that, contrary to Section 2(b) of the Act, affects local rates or pricing of equipment. NARUC Pet., pp. 12-13.²⁸

However, as the court below found, Section 2(b) does not restrict preemption in this case. The *Computer II* decision does not set rates for intrastate communications

²⁸ LPSC similarly relies on Section 2(b). See LPSC Pet., pp. 22-24. In fact, both LPSC and NARUC point out (LPSC Pet., pp. 23-24; NARUC Pet., pp. 15-16) that Section 2(b) was enacted in response to this Court's *Shreveport* decision [*Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914)]—a decision which Congress disapprovingly read to permit federal agencies to set local rates based on the indirect effects such rates might have on interstate service. *Shreveport* upheld an ICC order that effectively required the revision of intrastate railroad rates that were lower than rates for comparable interstate rail services, so as to remove the resulting discrimination against interstate commerce. No such agency order is involved here. The FCC has neither sought to set rates for intrastate services nor asserted jurisdiction to regulate matters of state concern owing to any claimed intrastate discrimination against interstate business.

services or facilities. Instead, the Commission has exercised its direct authority to determine the regulatory treatment of CPE used for interstate communications. As the court of appeals explained:

"The operative principle in this case is precisely the principle that demanded state preemption in the *NCUC* cases. There, the preemption of state regulations that restricted interconnection was justified because those regulations impeded the validly adopted federal policy of unrestricted interconnection. Similarly, in *Computer II* preemption of state tariffs on CPE is justified because staff tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy. In *Computer II*, the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in *NCUC I* and *II*, the state regulatory power must yield to the federal."²⁹

NARUC, while apparently accepting the general principle of the *NCUC* cases, argues that preemption of CPE *rate* regulation is a different matter. However, Sections 2(a) and (b) of the Act allocated federal and state authority with respect to both "charges [and] . . . facilities" in precisely the same terms. Moreover, the *NCUC* cases specifically involved preemption of state tariffed

²⁹ Pet. App. at A-38, 693 F.2d at 216. LPSC's suggestion (LPSC Pet., p. 16) that the court of appeals' analysis was deficient on this score because it did not probe more deeply into the Commission's substantive findings regarding the regulation of CPE is also erroneous. When a federal agency "promulgates regulations intended to pre-empt state law, the court's inquiry is . . . limited" to whether the agency exceeded its statutory authority or acted arbitrarily. *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

charges for terminal equipment used for interconnection. Similarly, the rates in question here are for individual pieces of CPE used interchangeably for both interstate and intrastate transmission, and conflicting federal and state policies with respect to such equipment are no more feasible or tolerable where equipment rates are involved than where equipment interconnection is involved.³⁰ The court below so found. Pet. App. at A-39, 693 F.2d 216.³¹

Where the equipment used or service being performed (including the terms and charges therefor) cannot be regarded as purely intrastate but are, instead, fully integrated into the interstate communications system (as well as intrastate communications) federal preemption is necessary and appropriate in situations where there is a conflict between federal and state regulatory policies. That is what the court of appeals held in this case. It is

³⁰ The Act itself, it can be noted, further recognizes the need for "federal superintendence" of such dual-use equipment even in rate matters by giving the FCC the final authority to apportion costs of common carrier property between interstate and intrastate operations. Section 410(c), 47 U.S.C. § 410(c).

³¹ Although relying principally on Section 2(b), Petitioners also contend that Section 221(b) of the Act stands as a bar to federal preemption in these circumstances. See LPSC Pet., pp. 23-25; NARUC Pet., p. 11. But, as the courts have uniformly held, Section 221(b) has a highly specific and narrow focus—i.e., to preserve state authority over those local telephone exchanges that serve metropolitan areas that encompass more than one state. Since Section 221(b) is designed to cover only those limited circumstances, it is totally inapposite here. See *NCUC I*, *supra*, 537 F.2d at 795; *NCUC II*, *supra*, 552 F.2d at 1045; *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698-99 (1st Cir. 1977). See also S. Rep. No. 781, 73rd Cong., 2d Sess., p. 5 (1934), which expressly states that Section 221(b) was intended to enable state commissions "to regulate exchange services in metropolitan areas overlapping state lines." The Court below also adopted this view. Pet. App. at pp. A-39 - A-40, 693 F.2d at 216-17.

also what the Fourth Circuit held in the *NCUC* cases.³² And it is what other circuits have consistently held in other cases where the issue has been addressed.

For example, rejecting the same jurisdictional argument that was raised in the *NCUC* cases, the First Circuit in *Puerto Rico Telephone Co. v. FCC*³³ upheld the FCC's authority to prohibit the Commonwealth of Puerto Rico from barring carriers from restricting the attachment of customer-provided equipment to the telephone network even though the equipment would be used in part to provide intrastate service.³⁴ Similarly, the Second Circuit in *N.Y. Telephone Co. v. FCC*³⁵ upheld the FCC's assertion of jurisdiction over local exchange service when used in connection with interstate foreign exchange (FX) and common control switching arrangement facilities (CCSA).³⁶

³² This Court denied writs of certiorari in both *NCUC* cases. No reason is presented to suggest a change of circumstances which would make grant of a writ more appropriate at this time. Indeed, the most significant development in the intervening years has been that three additional circuits (including the D.C. Circuit) have affirmed the jurisdictional approach in the *NCUC* cases.

³³ 553 F.2d 694 (1st Cir. 1977).

³⁴ In the words of the First Circuit:

"We think that the clear import of the Communications Act, as it has been construed by the FCC and by the courts for many years, is that no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate telephone system measured against federal standards of reasonableness under § 201 [of the Act]. We are therefore led to the conclusion that § 201 displaced the residual state jurisdiction guaranteed by [2(b)] since the interconnection policies adopted by the FCC and [Puerto Rico] are incompatible." *Puerto Rico Telephone Co. v. FCC*, *supra*, 553 F.2d at 700.

³⁵ 631 F.2d 1059 (2d Cir. 1980).

³⁶ After quoting with approval the finding of the Fourth Circuit in *NCUC I* that Section 2(b) of the Act does not "sanction any state regulation, formally restrictive only of intrastate communica-

Furthermore, even though not dealing directly with Section 2(b), the Second Circuit recently confirmed the paramount goal of the Communications Act to achieve a unified interstate communications system by upholding the FCC's preemption of New York State's regulation of television master antenna systems. *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 64-66 (2d Cir. 1982).³⁷ Finally, it should be noted that prior to this case the D.C. Circuit joined the Second Circuit in concluding that the FCC has authority over foreign and common control switching arrangement facilities that are used for both interstate and intrastate communications. *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).³⁸

In sum, the decision of the court of appeals is fully consistent with long-established general principles of federal preemption set forth in prior decisions of this Court, and, in addition, is in complete accord with the decisions of all other circuit courts that have specifically addressed the Commission's preemptive authority under the Communications Act. Petitioners cannot deny that state tar-

tion, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205" (537 F.2d at 793), the Second Circuit concluded that:

"Even if the local exchange service is separable technologically and in terms of cost assessment from the dedicated private line in FX and CCSA service, there is no doubt that the [New York Telephone] surcharge on interstate FX/CCSA users . . . substantially affects the conduct or development of interstate communication and encroaches upon FCC authority." 631 F.2d at 1066.

³⁷ Cf. *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) [where Second Circuit upheld FCC's preemption of state price regulation of pay cable television programming].

³⁸ Cf. *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) [where D.C. Circuit upheld FCC preemption of state regulation of non-common carrier spectrum allocation].

iffing of dual-use CPE would make "compliance with both federal and state regulations . . . a physical impossibility." *Florida Lime, supra*, 373 U.S. at 142-43. Consequently, under undisputed principles of federal preemption, the court of appeals' ultimate approval of the Commission's primary authority over dual-use CPE was correct and need not be reviewed by this Court.

CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

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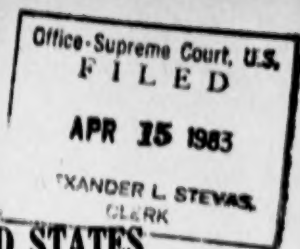
APPENDIX**RELEVANT STATUTORY MATERIAL****§ 151. Purposes of chapter; Federal Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.



Nos. 82-1331, 82-1352

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, THE PEOPLE OF THE STATE OF
CALIFORNIA, AND THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

**ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION FOR RESPONDENT
INTERNATIONAL BUSINESS MACHINES
CORPORATION**

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QUESTION PRESENTED

Whether the court of appeals was correct in upholding the Federal Communications Commission's decision to preempt state regulations that would prevent the effective implementation of the Commission's determination that all customer premises telephone equipment should be offered only on an unregulated basis.

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, THE PEOPLE OF THE STATE OF
CALIFORNIA, AND THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

**On Petitions for Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENT
INTERNATIONAL BUSINESS MACHINES CORPORATION**

International Business Machines Corporation (IBM) submits this brief in opposition to the petitions for writ of certiorari.¹

STATEMENT OF THE CASE

In 1980, the Federal Communications Commission decided in a rulemaking known as *Computer Inquiry II* to end traditional public utility regulation of telecommunications equipment that is physically located on a customer's premises — commonly termed customer premises equipment, or CPE. Until that decision, the Commission had allowed communications common carriers to offer the use of CPE as a regulated service, and to combine that offering with their transmission offerings under a single bundled tariff. Noncarrier suppliers offered CPE on an unregulated basis. Under *Computer Inquiry II*, carriers and noncarriers alike will offer CPE without regulation.²

1. Pursuant to Rule 28.1, we construe the terms "parent companies," "subsidiaries" and "affiliates" to mean those corporations (1) the shares of which are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of the shares of which are owned by a party. IBM has no parent companies, subsidiaries, or affiliates.

2. See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384 (1980) ("*Final Decision*"); *Memorandum Opinion and Order on Reconsideration*, 84 F.C.C.2d 50 (1980) ("*Reconsidered Decision*"); *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981) ("*Further Reconsidered Decision*"). In its decision the Commission also ended public utility regulation of all enhanced services (which it defined as communications services involving more than pure transmission) and imposed structural and/or accounting requirements on carriers that offer CPE or enhanced services.

The Commission concluded in *Computer Inquiry II* that CPE was not properly subject to entry and rate regulation under Title II of the Communications Act of 1934.³ It further found that the historical practice of allowing carriers to tariff CPE was no longer in the public interest because of the high level of competition that exists in the CPE marketplace.⁴ The Commission found that allowing carriers to package CPE with transmission service impeded that competition and adversely affected communications users.⁵ It concluded that unregulated competition in the provision of CPE would best serve the objectives of the Communications Act by promoting more efficient interstate communications.⁶

The Commission expressly found that state entry and rate regulation of CPE used jointly for interstate and intrastate communications would undercut the achievement of these objectives.⁷ It accordingly preempted the states from regulating CPE "to the extent that their terminal equipment regulation is at odds with the regulatory scheme set forth."⁸ However, the Commission

3. 47 U.S.C. §§ 151 *et seq.* (1976 & Supp. IV 1980); see *Final Decision* ¶ 173, 77 F.C.C.2d at 451-52; *Reconsidered Decision* ¶¶ 28, 46, 148-50, 84 F.C.C.2d at 61, 65, 101-02.

4. See *Final Decision* ¶¶ 141, 143-44, 179, 77 F.C.C.2d at 439, 440, 453; *Reconsidered Decision* ¶¶ 149-50, 84 F.C.C.2d at 101-02.

5. See *Final Decision* ¶¶ 9, 145-59, 77 F.C.C.2d at 388, 441-46; *Reconsidered Decision* ¶¶ 46, 140-41, 84 F.C.C.2d at 65, 98-99.

6. *Final Decision* ¶¶ 160, 179-81, 77 F.C.C.2d at 447, 453-54; *Reconsidered Decision* ¶¶ 140-41, 84 F.C.C.2d at 98-99.

7. *Id.*; *Final Decision* ¶¶ 184-85, 77 F.C.C.2d at 455; *Reconsidered Decision* ¶¶ 155-57, 84 F.C.C.2d at 103-04. Since most CPE has been tariffed at the state level, even though it is used jointly for interstate and intrastate communications, the Commission's decision would have little effect if it eliminated only federal tariff requirements. See *id.*

8. *Reconsidered Decision* ¶ 154, 84 F.C.C.2d at 103; *Final Decision* ¶ 184, 77 F.C.C.2d at 455.

limited its preemption so as not to displace state regulation of CPE that was compatible with federal policy.⁹

The court of appeals denied petitions to review the deregulation of CPE and all other aspects of the Commission's decision. The court agreed that preemption of state rate and entry regulation of CPE was justified because such regulation would frustrate the lawful objectives of the Commission's decision to remove CPE from federal public utility regulation.¹⁰ The Court held that the Commission's findings on this point were detailed and logical and that its conclusion was rational.¹¹ And it held that the Commission had acted within the scope of its statutory jurisdiction over interstate communications, because CPE is used for both interstate and intrastate communications.¹²

ARGUMENT

The petitioners raise only a narrow issue that does not warrant further review. Petitioners do not ask the Court to review the lawfulness of the Commission's underlying determination that CPE should be deregulated. The only issue they raise is the lawfulness of the Commission's conclusion that implementing that determination requires displacement of inconsistent state regulatory requirements. They have shown no reason why that issue merits review by this Court.

9. For example, it left the states largely free to determine the manner in which regulated CPE now in use will be removed from a telephone company's rate base. *Further Reconsidered Decision* ¶¶ 29-35, 71, 88 F.C.C.2d at 522-24, 537.

10. *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).

11. *Id.* at 215.

12. *Id.* at 215-17.

The case does not raise important or unresolved issues of federal law. The general principles governing federal preemption of inconsistent state regulatory programs are well established. State regulation must give way under the Supremacy Clause (i) if "compliance with both federal and state regulations is a physical impossibility," or (ii) if the state regulatory scheme stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³ Rules lawfully promulgated by federal agencies have the same preemptive effect as federal statutes where this test is met.¹⁴

More specifically, the ground rules on preemption by the Commission of state regulation of CPE have been clearly established in a series of well-reasoned court of appeals decisions, principally decisions of the Fourth

13. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Thus, state regulation is displaced whenever "the purpose of the federal statute would to some extent be frustrated by the state statute." *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963). The older case of *North Carolina v. United States*, 325 U.S. 507 (1945), on which petitioners rely, is not in point because it turned on an interpretation of particular provisions of the Interstate Commerce Act not present in the Communications Act.

14. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 50 U.S.L.W. 4916 (U.S. June 28, 1982); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *Free v. Bland*, 369 U.S. 663, 668 (1962).

Circuit.¹⁵ The Fourth Circuit twice upheld the Commission's authority to prescribe rules for the attachment of noncarrier-provided CPE to the telephone network and to displace any conflicting state rules. Certiorari was twice denied. Those decisions confirm the Commission's authority to override state rules that conflict with federally established policy with respect to facilities used for both interstate and intrastate service.

The court below properly applied these principles. It correctly sustained the Commission's finding that state public utility regulation of CPE would frustrate the Commission's objectives in deregulating CPE, and held that the Commission's decision to deregulate CPE was within its authority under the Communications Act. Contrary to petitioner Louisiana Public Service Commission's argument, the fact that the issue is one of preemption does not render irrelevant the normal limits on judicial review of agency action.¹⁶

15. *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

The Commission's authority to regulate facilities used for interstate communications regardless of their relative interstate or intrastate use has been upheld in many contexts. E.g., *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *People of the State of California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), cert. denied, 434 U.S. 1010 (1978); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977).

16. In *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, supra, the Court reaffirmed that

"[f]ederal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."

50 U.S.L.W. at 4919.

Petitioner NARUC's argument that the decision below conflicts with the Fourth Circuit cases is without merit. Both the Fourth Circuit cases and the decision below upheld assertions of Commission jurisdiction over CPE used jointly in interstate and intrastate communications. Both upheld preemptions of state rules that were inconsistent with federal rules regarding such equipment. Petitioner's argument that here, in contrast to the Fourth Circuit cases, the Commission has impermissibly displaced state ratemaking authority is, as the court below pointed out, simply without basis.¹⁷ The Commission neither attempted to set rates for intrastate communication services, nor asserted jurisdiction to regulate matters of purely state concern. While the Commission's action indirectly affects rates because it removes assets from a telephone company's rate base, that indirect effect is not an impermissible preemption of state ratemaking authority. The Commission's action here has no more of an effect on state ratemaking than did the Commission actions sustained by the Fourth Circuit.

17. 693 F.2d at 216.

CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

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IN THE
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No. 82-1331

LOUISIANA PUBLIC SERVICE
COMMISSION *Petitioner*

VS.

FEDERAL COMMUNICATIONS COMMISSION AND
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and BRIEF AMICUS CURIAE
OF THE STATE OF ARKANSAS and
THE ARKANSAS PUBLIC SERVICE COMMISSION
IN SUPPORT OF A PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

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LOUISIANA PUBLIC SERVICE

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THE ARKANSAS PUBLIC SERVICE COMMISSION
IN SUPPORT OF A PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS**

Come now the State of Arkansas and the Arkansas Public Service Commission, by and through the Honorable J. Steven Clark, Attorney General of the State of Arkansas, and for their Motion for Leave to File Brief *Amicus Curiae* in Support of a Petition for a Writ of Certiorari states that:

(1) The people of the State of Arkansas, and the State of Arkansas itself, are significant users of intrastate and interstate telecommunications services and equipment. The State of Arkansas has, accordingly, established the Arkansas Public Service Commission to regulate public utilities providing telecommunications services within the State. The State

of Arkansas and the Arkansas Public Service Commission, therefore, have an interest in the outcome of this proceeding.

(2) Rule 36 of the Rules of the Supreme Court permit a State to file an *amicus curiae* brief where, as here, said brief is sponsored by its Attorney General.

WHEREFORE, the State of Arkansas and the Arkansas Public Service Commission pray for leave to file a brief *amicus curiae* in support of a Petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit.

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No. 82-1331

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Louisiana Public Service

Commission *Petitioner*

V.

Federal Communications Commission

and United States of America *Respondents*

BRIEF AMICUS CURIAE OF THE STATE OF ARKANSAS
AND THE ARKANSAS PUBLIC SERVICE COMMISSION
IN SUPPORT OF A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

INTEREST OF THE AMICUS CURIAE

The vast majority of the citizens of the State of Arkansas, and the State itself, receive telecommunication services from either Southwestern Bell Telephone Company, General Telephone Company of the Southwest, or Continental Telephone Company of Arkansas, all utilities subject to the interstate jurisdiction of the Federal Communications Commission (hereinafter, FCC). The charge these customers pay for their on-premises equipment is an important element of their monthly telephone bill. In fact, the customer premise equipment charge is so important, that State law has, for half a century, authorized the Public Service Commission to regulate it.

If the District of Columbia Circuit Court of Appeals' decision in *Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), is not reversed, the protection state regulation has traditionally provided the customers of the affected utilities in the provision of customer premises equipment will be eliminated. In that decision, the court upheld a series of orders by the Federal Communications Commission decreeing that customer premises equipment, contrary to Arkansas law and practice, should be free from state regulation.¹

The result below will obviously impair the ability of the State of Arkansas to insure that all its citizens have access to reliable telephone service at reasonable and nondiscriminatory rates. More disturbingly, the result below sets a precedent that may hasten the erosion of state power in an area historically reserved to the states, the regulation of local utility rates.

The Attorney General of Arkansas, empowered by Arkansas law to represent the public interest before state and federal courts and regulatory agencies, and the Arkansas Public Service Commission, the agency responsible under Arkansas law for the regulation of local utility rates, have a legitimate interest in the outcome of this proceeding.

¹Generally known as the "Computer II case," these orders were issued in *The Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828 and are reported as "Final Decision," 77 FCC2d 384 (1980), "Memorandum Opinion and Order," 84 FCC2d 50 (1980) and "Memorandum Opinion and Order on Further Reconsideration," 88 FCC2d 512 (1981).

SUMMARY OF ARGUMENT

A writ of certiorari should be issued by this Court to the court below for three reasons. First, the regulation or deregulation of customer premises equipment is an issue of substantial national importance. Second, the court below misapplied the preemption doctrine as developed in previous decisions of this Court. Third, the language of the Communications Act of 1934 does not authorize the FCC to prohibit state regulation of intrastate rates for customer premises equipment.

REASONS FOR GRANTING A WRIT

I. The Issue Is of Substantial National Importance.

Customer premise equipment (hereinafter, CPE) includes simply the equipment, from home telephones to office switchboards, necessary to access the nation's telephone network. The significance of the power of the states to regulate the provision and intrastate pricing of such equipment should be clear, especially in light of the FCC's commitment to deregulation.

This case raises fundamental issues involving the proper distribution within our federal system of power over the provision of utility services, issues which, in this context, are no less significant than those raised in similar cases recently heard by this Court. *Federal Energy Regulatory Commission v. Mississippi*, ___ U.S. ___, 102 S.Ct. ___, 72 L.Ed.2d 532 (1982); *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, U.S. Sup. Ct. No. 81-731, *Pacific Gas and Electric Co., et al v. State Energy Resources*

Conservation & Development Commission, et al, U.S. Sup. Ct. No. 81-1945.

This case is, therefore, important to all consumers of telephone service, and to all the states which regulate it. For this reason alone, we would ask this Court to review the result below.

II. The Court Below Misapplied the Preemption Doctrine.

In holding that the FCC could preempt state power over CPE, the court below did not consider the guidance this Court has provided in determining when federal action should be held to preempt state action. Indeed, rather than relying on decisions of this Court, the Court of Appeals cited *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2nd Cir. 1982) for the proposition that: "Federal regulation need not be heavy-handed in order to preempt state regulation."

A reviewing court must, however, start with the presumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981). The leading case defining the preemption doctrine is *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) which provided that preemption would not be implied absent a clear conflict in state and federal law or a clear need for a uniform national policy. This case is not cited in the opinion of the court below.

In those cases where state regulation has been held preempted by federal regulation, there was a clash in

affirmative regulation at both levels, not the regulatory vacuum created here. *See, Tribe, American Constitutional Law* (1978), pp. 386-389. The fact Congress has created a regulatory agency to exercise some power in a given field surely cannot be held to authorize the federal agency to completely deregulate that field and expel the States from it. Most areas of American economic life have been placed under at least partial regulation by federal agencies. If the philosophy endorsed by the Court below survives judicial review, nothing, other than the discretion of federal administrators, will prevent transforming the states into administrative subdivisions of a central bureaucracy.

III. The Communications Act of 1934 Does Not Authorize the FCC to Prohibit State Regulation of Customer Premises Equipment.

Even ignoring the preemption doctrine, as the court below apparently did, the orders of the FCC should be reversed as contrary to the express provisions, and traditional application, of the Communications Act of 1934.

In at least two instances, Congress, in the Communications Act, reserved to the states the power to regulate the pricing of intrastate telephone service and equipment. First, Section 152(b) provides, *inter alia*:

[S]ubject to the provision of Section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier. . . .²

²47 U.S.C. §152(b).

Then, at Section 221(b), Congress provided:

Subject to the provisions of Section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to . . . wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local governmental authority.³

In short, Congress has clearly sanctioned state rate regulation of primarily local telephone service. This would include the regulation of CPE. The FCC, itself, has admitted what common sense tells us; CPE is "used predominantly in intrastate communications." *Computer II, Final Decision*, 77 FCC2d 384, 456 (1980).

Consistent with the Communications Act, FCC involvement in ratemaking has generally been limited to fixing interstate toll rates. To do this, and to facilitate the separation of interstate toll revenue among telephone companies, the FCC has allocated a portion of each company's plant, including CPE, to the interstate market. The States have, however, been responsible for pricing intrastate toll rates, local access charges, and CPE.

Congressional acceptance of this practice over the years suggests that it properly implemented the intent of Congress in passing the Communications Act. Where Congress has

³47 U.S.C. §221(b).

acquiesced in a longstanding administrative interpretation of a statute, that policy should be held a proper expression of legislative intent. *See, U.S. v. Leslie Salt Co.*, 350 U.S. 383, 76 S.Ct. 416, 100 L.Ed. 441 (1956), *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1954).

This should be especially true when a reversal of agency policy would restrict state authority in the field of utility regulation, an area the states have pioneered. *See, Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950) (Jackson, J., dissenting). But if left unchecked, the FCC may expand its conceded jurisdiction to assign costs in the development of interstate toll rates to emasculate the state commissions. Since virtually all telephone plant is used, to some extent, for interstate messages, the limits of FCC power, under the holding of the court below, are difficult to imagine. Already the FCC has attempted to preempt state authority to set depreciation rates, even for purposes of intrastate ratemaking. *In the Matter of Amendment of Part 31, Uniform Systems of Accounts for Class A and B Telephone Companies*, Docket No. 79-105, Memorandum Opinion and Order (January 6, 1983). Congress could not, in 1934, have envisioned, and the courts, today, should not permit, this invasion of traditional state prerogatives.

CONCLUSION

The State of Arkansas and the Arkansas Public Service Commission ask this Court to grant the Louisiana Public Service Commission's petition for a writ of certiorari to the United States Court of Appeals, District of Columbia Circuit.

Respectfully submitted,

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THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF AMICUS CURIAE STATE OF CONNECTICUT
IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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**ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

The State of Connecticut has appeared as Amicus Curiae before the United States Court of Appeals for the District of Columbia and pursuant to rule 36(4) is filing this amicus curiae brief in support of the request of the petitioners, Louisiana Public Service Commission (Case No. 82-1331) that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered November 12, 1982.

INTEREST OF THE STATE OF CONNECTICUT

The State of Connecticut has in one form or another been regulating intrastate telephone service and tariffs for approximately one hundred years. Connecticut's regulatory responsi-

bilities reside in Connecticut Department of Public Utility Control.

Through its decision in the Computer II final decision 77 FCC 2d 384 (1980) the Federal Communications Commission usurped valid intrastate regulation of customer-premise equipment, *sui generis*, by preempting the states from such regulation.

This intrusion into the valid exercise of the state police power exceeds the statutory authority of the Communications Act of 1934 and establishes a theory of preemption which permits administrative agencies the exercise constitutional powers reserved solely to the Congress.

REASONS FOR GRANTING THE WRIT

THE FEDERAL COMMUNICATIONS COMMISSION PREEMPTION OF STATE RATEMAKING WAS NOT BASED ON ANY CONGRESSIONAL EXPRESSION

Your Amicus believes that the Federal Communications Commission (FCC) powers have been misconstrued and that the FCC invaded an area of overwhelming state concern without Congressional authority. The preemption of a state's fundamental exercise of police power to regulate its public utilities is not easily accomplished. States are reserved the exercise of their police power under the provisions of the tenth Amendment to the Constitution of the United States which provides: "The powers not delegated to the United States, are reserved to the States respectively, or to the people." Where Congress has not expressly preempted states from a field of regulation, as in the instant matter, then the Court may test for implied preemption. In challenges to state laws that involve a state's traditional exercise of police power, the initial presumption is that the federal act will not super-

sede the state law unless it is the clear and manifest purpose of Congress. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230, (1947).

In reviewing the limits of Congressional preemption under the Communications Act this Court in *Head v. New Mexico Board of Examiners* 374 U.S. 424 required positive evidence of legislative intent to preclude state regulation, holding: "(I)n the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern." 374 U.S., at pages 431-432.

In this instant matter the Congressional intent was to reserve intrastate ratemaking to the states. Various sections of the Communications Act specifically affirm Congressional intent to preserve the states powers to regulate their telephone companies. (see 47 USC 221 (a) and (b) 47 USC 152 (b)) Thus, the only positive evidence of Congressional intent in this area is to leave intact the State's traditional regulatory authority. The FCC's conclusion to the otherwise constitutes an administrative amendment to its statutory jurisdiction, a power reserved only to Congress.

The FCC's self generated power to preempt State regulation is not well founded and should be reversed.

CONCLUSION

As discussed in the petitioner's brief more fully, the FCC's motivations for preempting the states are not the motivations of Congress. Therefore the State of Connecticut respectfully requests that this Court issue the requested writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APR 18 1983

Nos. 82-1331 and 82-1352
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE;
BRIEF AMICUS CURIAE OF THE
FLORIDA PUBLIC SERVICE COMMISSION
IN SUPPORT OF THE
PETITIONS FOR WRIT OF CERTIORARI OF
THE LOUISIANA PUBLIC SERVICE COMMISSION,
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, THE PEOPLE OF THE
STATE OF CALIFORNIA AND THE PUBLIC
UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Nos. 82-1331 and 82-1352

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Petitioners,

v.

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Respondents.

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to the United States Court of
Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF THE
PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Florida Public Service
Commission (hereinafter "FPSC")
respectfully moves for leave to file
the attached brief amicus curiae in

support of the request of the
Petitioners, Louisiana Public Service
Commission (Case No. 82-1331) and
National Association of Regulatory
Commissioners, et al. (Case No.
82-1352) that a writ of certiorari
issue to the United States Court of
Appeals for the District of Columbia
Circuit. The consent of counsel for
the Petitioners to the filing of a
brief amicus curiae by the FPSC has
been obtained. The consent of
respondents Federal Communications
Commission and the United States of
America to the filing of a brief amicus
curiae by the FPSC has also been
obtained.

The interest of the FPSC in this
matter results from a statutory
obligation to ensure the provision of
telephone service at reasonable rates

to the citizens of Florida (Chapter 364, Florida Statutes).

The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by Petitioners is to curtail the ability of the FPSC to secure quality telephone service at reasonable rates for the citizens of Florida.

Accordingly, the FPSC is uniquely qualified to represent the interests of Florida's telephone ratepayers and users who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

Respectfully submitted,

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Nos. 82-1331 and 82-1352

In The Supreme Court
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BRIEF AMICUS CURIAE OF THE
FLORIDA PUBLIC SERVICE COMMISSION

INTEREST OF THE
FLORIDA PUBLIC SERVICE COMMISSION

The Florida Public Public Service
Commission (hereinafter "FPSC") is an
agency of the State of Florida
empowered to regulate, inter alia, the

provision of telephone service in the state. (Chapter 364, Fla. Stat.). The specific statutory responsibility of the FPSC is to ensure that the rates for telephone service in Florida are "fair, just, reasonable and sufficient" and that the services rendered are "prompt, expeditious and efficient" (§364.03, Fla. Stat.).

In addition, the FPSC is charged with the responsibility of monitoring and investigating "interstate rates, fares, charges, classifications, or rules of practice in relation thereto ... within this state" and to "petition the Federal Communications Commission where the same are ... excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934" ...". (§364.27, Fla. Stat.).

The Federal Communications Commission (hereinafter FCC) decision in the Second Computer Inquiry¹ (also referred to hereinafter as "Computer II") which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, Computer and Communications Industry Association v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), dramatically alters the structure of the telecommunications industry and the framework for regulating that industry.

Specifically, the FCC decision at issue purports to preempt the ability of the FPSC to fulfill its statutory

¹In the matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

mandate to ensure the provision of high quality, reasonably priced telephone service in Florida. The decision expressly precludes the FPSC from requiring Florida telephone companies to make available basic end-to-end telephone service to customers in Florida.

Accordingly, FPSC is vitally interested in the disposition of the pending petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of Congress.

SUMMARY OF ARGUMENT

The Communications Act of 1934, 47 U.S.C. § 151 et. seq. (hereinafter "the Communications Act" or "the Act") reserves regulatory authority for the

states over intrastate rates and practices in the provision of telephone service. The FCC decisions at issue unlawfully invade areas of intrastate ratemaking and local telephone operations, properly within the ambit of state regulatory authority under the Communications Act.

If allowed to stand, these holdings will effectively have rewritten the jurisdictional provisions of the Communications Act by allowing the FCC to capriciously occupy the entire field of communications regulation. Such a result is legally improper and in direct opposition to the clearly expressed Congressional intent to reserve significant authority for the states in regulating the communications field.

In addition to violating the

statutory ratemaking prerogatives expressly granted to the states by Congress, these actions foreclose the lawful ability of state regulators to ensure the provision and maintenance of basic local telephone service to state citizens. This outcome violates the spirit of the Communications Act to retain state control over service aspects of local telephone operations. The equitable impact of this facet of the FCC decision at issue is equally unconscionable and contrary to the delicate federal-state balance embodied in the Communications Act.

ARGUMENT

I. THE FCC MAY NOT PREEMPT THE LAWFUL RATEMAKING AUTHORITY RESERVED FOR THE STATES UNDER THE COMMUNICATIONS ACT OF 1934.

Under the Communications Act the longstanding policy for regulating

telephone service in this country has been to acknowledge a significant role for both federal and state authorities.² The recognition of a need for meaningful state control in this area is a result of the essentially local nature of many aspects of telephone service, vis a vis, the relationship of local telephone subscribers to their local telephone company.

Despite the absence of any significant jurisdictional revisions to the Act since its passage in 1934, the ambit of state regulatory authority thereunder has been steadily eroded by

²47 U.S.C. §§ 152(b) 221(b) (1976); 78 Cong. Rec. 10314 (1934); Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 149, 51 S. Ct. 65, 69 (1930).

the liberal and creative interpretations ascribed to the Act by the FCC and upheld by the intermediate federal appellate courts.³

³New York Telephone Co. v. F.C.C., 631 F. 2d 1059 (2d Cir. 1980) (State commission's attempt to force changes in separations procedures legitimates FCC preemption); California v. F.C.C., 567 F. 2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978) (joint FX/CSAA facilities "technically and practically difficult to separate" for purposes of assertion of Federal jurisdiction are within FCC purview); Puerto Rico Telephone Co., v. FCC, 553 F. 2d 594 (1st Cir. 1977) (FCC has jurisdiction to prescribe terms for interconnection of PBX equipment); Brookhaven Cable TV, Inc. v. Kelley, 573 F. 2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (FCC may preempt State price regulation of pay cable television programming under its broadcasting regulatory authority); and NARUC v. F.C.C., 525 F. 2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (FCC may preempt State regulation of noncommon carrier spectrum allocation).

The case presently under consideration represents a judicial and administrative interpretation of the Act far in excess of the bounds of reasonable liberality or creativity. In effect, the Second Computer Inquiry decisions and the District of Columbia Circuit's affirmance thereof constitute the enactment of new legislation by the administrative and judicial branches of the federal government. This function, however, is properly reserved for the Congress under the United States Constitution (Article 1, Section 1).

In furtherance of the well established principles of separation of powers, established in the U.S. Constitution and embodied in the relevant federal statutes enacted thereunder, this Honorable Court must strike down the unlawful attempt of the

FCC and the District of Columbia Circuit to effectively rewrite the Act in clear controvention of the expressed will of the Congress.

A failure in this regard will destroy the delicate Federal-State balance of authority which has served this nation well in the regulation of communications for almost fifty (50) years. Moreover, inaction by the Court in this case will be tantamount to endorsing of a federal agency's ability to take action beyond the unambiguous congressional mandate of its enabling statute. For obvious reasons, the Court should refuse to contenance either of these outcomes and issue the writ of certeriori sought by petitioners.

Rather than restate further legal authority at length in support of the

foregoing argument, amicus curiae FPSC hereby expressly adopts the caselaw and statutory authority heretofore cited in the filings made by petitioners and similarly situated amicus curiae in this proceeding. In all other respects, the FPSC expressly endorses and adopts the positions of petitioners in this proceedings as set forth in the briefs on file with the Court.

**II. THE FCC MAY NOT EQUITABLY
DEPRIVE LOCAL TELEPHONE RATEPAYERS
OF THE OPTION TO OBTAIN BASIC
END-TO-END LOCAL TELEPHONE SERVICE
FROM THEIR LOCAL TELEPHONE COMPANY**

In addition to the legal arguments articulated in the jurisdictional briefs of petitioners in this case, and supported in the foregoing discussion, there is a profound equitable consideration which supports the issuance of a writ of certiorari in this case.

Apart from the outright invasion of state ratemaking prerogatives effectively accomplished by the decisions below, the Computer II holdings foreclose the fundamental ability of state regulators to secure the option for local customers to look to their local telephone company for basic end-to-end telephone service.

If the Computer II holdings are not overturned by this Court, citizens in Florida and throughout this country will no longer be able to rely on their local telephone company for the provision and maintenance of basic telephone service. Instead, local customers will be forced into a harsh and unwanted environment of multiple supply and maintenance entities for each segment of basic telephone service. (i.e., transmission line,

telephone set, inside wire, etc.)

The resulting inability to hold any single entity responsible for providing telephone service and maintenance will be disastrous. In a state such as Florida, with a high proportion of elderly citizens on fixed incomes, the potential for customer abuse, dislocation and dissatisfaction is staggering. This concern is supported by a recent statewide poll conducted in Florida showing that 86% of the citizens desired an option to continue leasing a telephone set from the local telephone company as part of basic service.⁴

⁴Florida Statewide Survey, April 1982, conducted by MGT of America, Inc. 2425 Torreya Drive, Tallahassee, Florida 32303

Notwithstanding this clearly expressed desire, Florida citizens will no longer be able to look to the local phone company for basic service if the Computer II preemption decision is allowed to stand.

Customers whose telephone service ceases to function will face a never-ending cycle of "buck passing" and "runarounds" between the various suppliers and maintainers of each segment of telephone service. Shared responsibility, in this event, will likely mean an absence of responsibility for ensuring that telephone service is provided and maintained.

Although, given a choice, most local customers may wish to retain the option to obtain end-to-end basic telephone service and maintenance from

their local telephone company, state regulators can no longer require that this option be made available under the preemption decisions presently before the Court.

The above expressed category of equitable concern is clearly local in nature. The Act recognizes this intimately local aspect of telephone service and reserves the appropriate regulatory authority to the states in this area. The Computer II decisions and the Appellate Court's affirmance thereof, obliterate the judicious Congressional intent to reserve appropriate regulatory power for the states in overseeing such matters of local concern in the provision and maintenance of telephone service.

In response, this Honorable Court must reverse the decisions and restore

the proper jurisdictional balance originally intended by Congress. Accordingly, the Court should issue the writ of certiorari requested by petitioners in this case, to review this issue of deep concern for every American citizen.

CONCLUSION

For the foregoing reasons, FPSC respectfully urges this Honorable Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
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V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE STATE OF MAINE
IN
SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI
OF LOUISIANA PUBLIC SERVICE COMMISSION
AND NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, ET AL.

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**BRIEF AMICUS CURIAE OF THE STATE OF MAINE
AND THE MAINE PUBLIC UTILITIES COMMISSION IN
SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI
OF LOUISIANA PUBLIC SERVICE COMMISSION, *ET AL.***

**INTEREST OF THE STATE OF MAINE AND
ITS PUBLIC UTILITIES COMMISSION**

The State of Maine regulates the rates and service of telecommunications utility companies operating in the State, by means of a statutory scheme which vests extensive ratemaking and other regulatory authority in the Maine Public Utilities Commission. Me. Rev. Stat. Ann., tit. 35, §§1, 4, 15(13), 51 *et seq.* (1978, & Supp. 1982-1983). As part of its supervision of telephone utilities, the Maine Public Utilities Commission (Maine PUC) regulates by tariff the justness and reasonableness

of the charges made by telephone companies for every service provided within the State. *Id.* §§51, 61, 66, 69 (1978, & Supp. 1982-1983). Until the Federal Communications Commission issued its orders in the *Second Computer Inquiry*,¹ the Maine PUC included in its regulatory oversight the rates charged for all customer premises equipment, *i.e.*, the apparatus connected to the local lines of a telephone company, by means of which the customer can use those lines to send and receive voice messages or other intelligence.²

The *Second Computer Inquiry* decision, affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), profoundly changes the regulatory treatment of customer premises equipment (CPE) by purporting to require the states to refrain from further rate regulation of CPE, while also altering the corporate structure through which most CPE is provided. The FCC's decision thus deprives the State government of the authority to engage in economic regulation of a significant aspect of telephone service, based upon the State's assessment of local markets and of the pace of technological change in particular localities. Accordingly, the State of Maine and its Public Utilities Commission are directly interested in the disposition of the petitions for review by this court of the FCC's decision to deprive local regulators of authority and flexibility with respect to an important component of telephone service.

¹ *In the matter of amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (Final Decision), 84 FCC 2d (1950) (1980) (Reconsideration Order), 88 FCC 2d 512 (1981) (Further Reconsideration Order).

² For interstate transmissions originating from local facilities, of course, the rates are set by the F.C.C. rather than the Maine P.U.C.

SUMMARY OF ARGUMENT

The State of Maine and its Public Utilities Commission support the issuance of a writ of certiorari to the Court of Appeals for the D.C. Circuit, to review the affirmance of the Federal Communications Commission's *Second Computer Inquiry* decision. Because that decision imposes upon the states radical changes in the economic regulation of an essential service — without express Congressional authority — it raises important questions that this Court ought to review.

The new scheme imposed by the FCC with respect to customer premises equipment unlawfully departs from the regulatory obligations of the Commission, because it relies entirely on market forces, rather than agency review, to assure just and reasonable rates. This conflicts with the principle established by this court, in a case involving the remarkably similar statutory language of the Natural Gas Act, that reliance on the marketplace alone was inconsistent with the statute. *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1973).

The FCC lacks authority to order the states to deregulate CPE rates, since such preemption is neither inherently necessary for telephone regulation nor expressly provided by Congress. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). Indeed, intrastate rate regulation of telephone service and facilities is expressly reserved to the states, 47 U.S.C. §§152(b), 221(b). Although the Fourth Circuit Court of Appeals has recognized this limitation on the FCC's authority, the court of appeals in this case did not.

To resolve the conflicts in principle between the affirmance of the *Second Computer Inquiry* and decisions of this Court and the Fourth Circuit, and to address the vitally important issues of federal-state regulatory relationships in the control of an essential and rapidly changing industry, the Supreme Court should grant review of the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

- A. THE DECISION TO WHICH THESE PETITIONS ARE DIRECTED IS OF EXTRAORDINARY IMPORTANCE, BECAUSE IT ALTERS PROFOUNDLY THE RELATIONSHIP BETWEEN FEDERAL AND STATE REGULATION OF TELECOMMUNICATIONS, WITHOUT AN EXPRESS CHANGE IN POLICY BY CONGRESS.

Until the FCC's Orders in its *Second Computer Inquiry*, Maine's Public Utilities Commission had the clear authority to regulate rates for local service, including the rates for the instruments through which the customer made use of that service, the CPE. Despite the clear reservation of intrastate ratemaking powers to the states, by 47 U.S.C. §§152(b) and 221 (b), the FCC has now ordered State rate regulation of CPE out of existence, and the court of appeals has affirmed that unwarranted preemption.

No party in this matter would dispute that telephone service is a necessity in modern life, nor that fundamental structural and technological changes in the telephone utility industry are now occurring at an unprecedented rate. *See generally United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 51 U.S.L.W. 3628 (U.S., Feb. 28, 1983). In recognition of these changes, both the federal district court, in the government anti-trust suit against the Bell System, and the Federal Communications Commission, in its investigations of toll market structure and jurisdictional separation, have increasingly differentiated between the local aspects of telecommunications and the long-distance transmission service, tending to view those two services as fundamentally separate operations. *Id.*; *See also, In the Matter of MTS and WATS Market Structure*, C.C. Docket No. 78-72, Phase I, slip op. at paragraphs 1-8, 363-368 (F.C.C., February 28, 1983) ("Third Report and Order"). In its *Second Computer Inquiry*, however, the FCC has claimed exclusive authority, for the first time in the long history of the Federal Communications Act, to dictate the mode and extent of regulation of what is essentially a local aspect of telephone service: the instrument on the customer's premises.

As explained more fully in the following sections, and in the petitions filed by the Louisiana Public Service Commission and by the National Association of Regulatory Utility Commissioners, *et al.*, no congressional authority can be found for the FCC's imposition of these fundamental regulatory changes upon state regulatory bodies. The long history of joint regulation of CPE in itself establishes that the nature of the subject matter could not possibly justify federal preemption. Similarly, Congress has never expressly authorized either the FCC's policy or the preclusive effect of that policy upon the states. Because of the importance of these questions to the regulation of an essential utility service and to the relationship between federal and state regulatory authority, this Court should issue the requested writ of certiorari to resolve the apparent conflicts between the reasoning of the court of appeals and principles previously established by this Court.

B. EXCLUSIVE RELIANCE UPON MARKET FORCES IS NOT A LAWFUL SUBSTITUTE FOR PRICE REGULATION UNDER THE FEDERAL COMMUNICATIONS ACT, AND SUCH RELIANCE CONFLICTS WITH THE REASONING OF THIS COURT IN A PRIOR DECISION.

The court of appeals decision upholds the FCC's determination that CPE need not necessarily be regulated under Title II of the Communications Act, apparently on the basis of the Commission's finding of competition in the CPE market. 693 F.2d at 221. In reaching this conclusion, the court of appeals failed to give adequate consideration to this Court's decision in *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1973). That case arose from actions of the Federal Power Commission under the Natural Gas Act, the basic rate regulation provisions of which are remarkably similar to the Communications Act.¹

¹ Attached to this brief as an Appendix is a table that illustrates the dramatic similarities between the Natural Gas Act (15 U.S.C. §717 *et seq.*) and the Federal Communications Act.

While holding that the FPC had considerable flexibility in choosing the particular method by which to assure that rates were just and reasonable, the Court overturned the FPC's order, which sought to rely upon competition in the industry to assure reasonable rates. *Id.* at 396, 397. Recognizing the underlying purpose of regulation under the Act, *id.* at 397-399, the Court emphasized that "in our view the prevailing price in the marketplace cannot be the final measure of 'just and reasonableness' mandated by the Act." *Id.* at 397. In reaching this conclusion, the Court recognized that market circumstances may have changed since the enactment of the regulatory scheme, and that reliance upon competition might well be in the best interests of consumers, given changes in circumstances. This Court also recognized, however, that

It is not the court's role...to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process...

...For the court to step outside its role in construing this statute, and insert itself into the debate on economics and the public interest, would be an unwarranted intrusion into the legislative forum where the debate again rages on the question of deregulation of natural gas producers.

Id. at 400, 401.

As *FPC v. Texaco* makes clear, neither the FCC nor the courts may rely upon competition as a basis for deregulation of rates, in the absence of express Congressional approval. The court of appeals completely ignored this principle, however, in its review of the FCC's decision to deregulate CPE.⁴

⁴ The attention of the court of appeals was called to the Federal Power Commission case and the comparison between the two regulatory statutes at pp. 2-9 of the brief amicus curiae of the Maine Public Utilities Commission in that court.

Having concluded that deregulation by reliance on competition alone was permissible,¹ the court of appeals relied upon this Court's decision in *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968), to support the FCC's exercise of "ancillary jurisdiction" to prohibit the regulation by tariff of CPE. Such reliance is misplaced, however, for that decision establishes only that the FCC may exercise ancillary jurisdiction under 47 U.S.C. §152(a) with respect to aspects of communications that might not fall under other regulatory provisions, elsewhere in the Act. *Id.* at 167-168, 172-173, 178. Certainly, the questions of whether the FCC could lawfully refrain from regulation where it had found jurisdiction, or exercise its jurisdiction to prohibit certain regulatory treatments by other agencies, were never raised in the *Southwestern Cable* case. Indeed, the decision of the court of appeals does not directly address the unique characteristics of the FCC's exercise of ancillary jurisdiction in the *Second Computer Inquiry*: the jurisdiction was used not to assert regulatory authority but to require compliance with a deregulation scheme. In light of the fact that the very section of the Federal Communications Act which provides the source of "ancillary jurisdiction," 47 U.S.C. §152, also contains an express reservation of state power to regulate rates, it is remarkable indeed that an attempt has been made to read this Court's *Southwestern Cable* decision as authority for a sweeping policy change that ought to have been reserved for congressional action.

C. AFFIRMANCE OF THE FCC'S PREEMPTION OF STATE RATE REGULATION CONFLICTS WITH PRINCIPLES RECOGNIZED BY THIS COURT AND ANOTHER COURT OF APPEALS.

¹ The court, as an alternative ground, noted that separation of services subject to regulation from those that are not would be difficult. This argument, standing alone, fails to provide a basis for deciding whether to choose potentially overbroad regulation or to abandon jurisdiction.

In sanctioning the FCC's decision to preempt state regulatory agencies in order to further the federal agency's policy of non-regulation, the court of appeals failed to apply correctly the standards of this Court's decision in *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). In that case, this Court reiterated that the question of whether a state regulation so conflicts with a federal one as to require preemption depends upon whether the State regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 141 (citation omitted). Accordingly, the Court concluded that federal regulation of a given field should not be viewed as preemptive unless "either...the nature of the regulated subject matter permits no other conclusion or... Congress has *unmistakably so ordained*." *Id.* at 142 (emphasis added). The circumstances under which preemption has been upheld in this case contrast dramatically to the standard enunciated in the *Florida Lime*.

Here, the FCC has chosen to *abandon* regulation in one aspect of telecommunications, and the court of appeals has now concluded that such abandonment, under the guise of "ancillary jurisdiction," preempts state regulation of the price of CPE. The court seems to rest on the fact that "unbundling" of CPE and transmission rates is essential to a valid federal policy of assuring reasonable prices for transmission service. 693 F.2d at 213. Even if this is so, "unbundling" does not inherently require the removal of all price regulation. Assuming *arguendo* that "unbundling" is a congressionally authorized policy, the most that such a policy could support would be a preemptive order that all CPE rates set by the states be determined on an unbundled basis.⁶ This much, but certainly no more, could

⁶ In fact, many state commissions have already taken steps to unbundle CPE rates from other charges. See, e.g., *Re New England Telephone and Telegraph Co.*, 42 P.U.R. 4th 182, 237 (Me. P.U.C. 1981), wherein the Maine PUC authorized disaggregation of extension service rates into separate prices for the basic telephone (CPE), and the extension line (wiring).

arguably be viewed as essential, in order for federal and state regulations to "be enforced without impairing the federal superintendence of the field." *Florida Lime*, 373 U.S. at 142.

To extend the preemption beyond unbundling to the abrogation of all state ratemaking authority over CPE, however, is to conclude that the FCC's "ancillary" jurisdiction includes the very power that lies at the heart of the *Shreveport* doctrine: the power to enter an order directly affecting intrastate rates.⁷ The court of appeals itself acknowledges that "Congress may well have intended Section 2(b) of the Communications Act to prevent such a result in the communications area." 693 F.2d at 216 n.99. In the face of this recognized intention, however, the court of appeals has upheld a federal agency order that affects state rate orders in the most direct way possible — by denying them any effect whatsoever, regardless of the level of rates found reasonable by the state agency. In light of the congressional intention directly to the contrary of this result, it is obvious that the court of appeals has not applied the *Florida Lime* criterion in deciding the preemption question.

Unlike the D.C. Circuit Court of Appeals, the Court of Appeals for the Fourth Circuit has recognized that the FCC's regulatory flexibility and preemptive authority must stop short of interference in intrastate ratemaking determinations. In upholding the FCC's authority to preempt the states for the purpose of implementing a uniform policy for interconnection of CPE with the telephone network, the Fourth Circuit took pains to observe that the FCC's action in that instance "in no way purports to prescribe charges for local services; state commissions remain *unfettered in their discretion to set rates* for all local services and *facilities* provided by the telephone companies." *North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036, 1047 (4th Cir. 1977) ("*NCUC II*") (emphasis added). In the predecessor of that deci-

⁷ The *Shreveport* doctrine was announced in *Houston, East and West Texas Railway v. United States*, 234 U.S. 342 (1914).

sion, the court also observed that "ratemaking typifies those activities of the telephone industry which lend themselves to practical separation...in such a way that local regulation of one does not interfere with national regulation of the other." *North Carolina Utilities Commission v. Federal Communications Commission*, 537 F.2d 787, 793 n.6 (4th Cir. 1976) ("NCUC I").

Thus, the Fourth Circuit recognized the obvious congressional intent to preserve against preemption the ratemaking authority of state utility commissions, embodied in 47 U.S.C. §152(b). The D.C. Circuit, on the other hand, has brushed that reservation of authority aside, finding no distinction "between preemption principles applicable to state ratemaking authority and those applicable to other state powers." 693 F.2d at 216. The D.C. Circuit's finding that state ratemaking is not exempt from FCC preemption plainly conflicts with the conclusions of the Fourth Circuit. Even more importantly, the D.C. Circuit's reasoning is in conflict with the standards that this Court has established with respect to preemption.

CONCLUSION

Like the Federal Power Commission a decade ago, the FCC in its *Second Computer Inquiry* has attempted to respond to changing circumstances in the industry that it regulates by adopting radically different regulatory approaches without awaiting a redefinition of policy from Congress. Moreover, the FCC has purported to impose its newly created regulatory scheme upon the states, without any congressional mandate to do so. Despite the principles enunciated by this Court in the *Florida Lime* decision and in *FPC v. Texaco*, the court of appeals has affirmed the FCC's extraordinarily sweeping action. This Court should issue a writ of certiorari to determine whether state rate regulation of an essential utility industry can be abolished by federal agency action, in the face of an express reservation of ratemaking power to the states; and whether the Federal Communica-

tions Act, unlike the markedly similar Natural Gas Act, allows just and reasonable rates to be determined exclusively by mere reliance on market forces and abandonment of regulatory review. The Court in so doing can resolve issues of vital concern to the states and their regulatory bodies, due to the profound effect that the decision has on the states' ability to monitor the local, public impact of rapid technological and structural changes affecting an essential public service industry.

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APPENDIX

COMPARISON OF NATURAL GAS ACT AND COMMUNICATIONS ACT

Communications Act

"All charges, practices, classifications, and regulations...shall be just and reasonable..." 47 U.S.C. §201(b) (1962)

"...any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. §201(b)

"Every common carrier... shall...file with the Commission and print and keep open for public inspection schedules showing all charges..." 47 U.S.C. §203(a)

"No change shall be made in the charges... except after thirty days' notice to the Commission..." 47 U.S.C. §203(b)

"...the Commission...may suspend the operation of such charge...but not for a longer period than three months..." 47 U.S.C. §204

Natural Gas Act

"All rates and charges...and all rules and regulations... shall be just and reasonable." 15 U.S.C. §717c (a) (1976)

"...any such rate or charge that is not just and reasonable is declared to be unlawful." 15 U.S.C. §717c (a)

"...every natural-gas company shall file with the Commission...and keep open in convenient form and place for public inspection, schedules showing all rates and charges..." 15 U.S.C. §717c (c)

"...no change shall be made...in any such rate...except after thirty days' notice to the Commission..." 15 U.S.C. §717c (d)

"...the Commission...may suspend the operation of such schedule...but not for a longer period than five months..." 15 U.S.C. §717c (e)

“At any hearing involving a charge increased...the burden of proof to show that the increased charge...is just and reasonable shall be upon the carrier.” 47 U.S.C. §204

“Whenever...the Commission shall be of the opinion that any charge...is or will be in violation of any of the provisions of this Chapter...the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge...” 47 U.S.C. §205

“At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company...” 15 U.S.C. §717c (e)

“Whenever the Commission ...shall find that any rate...is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate...and shall fix the same by order.” 15 U.S.C. §717d (a)

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Nos. 82-1331 and 82-1352

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, et al.,
Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,**
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE;
BRIEF AMICUS CURIAE OF THE
MARYLAND OFFICE OF PEOPLE'S COUNSEL
IN SUPPORT OF THE
PETITIONS FOR WRIT OF CERTIORARI OF
THE LOUISIANA PUBLIC SERVICE COMMISSION,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
THE PEOPLE OF THE STATE OF CALIFORNIA AND
THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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PETITIONS FOR A WRIT OF CERTIORARI TO THE
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DISTRICT OF COLUMBIA CIRCUIT**

The Maryland Office of People's Counsel (hereinafter "MPC") respectfully moves for leave to file the attached brief *amicus curiae* in support of the request of the Petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, *et al.* (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the Petitioners to the filing of a brief *amicus curiae* by

MPC has been obtained. The consent of respondents Federal Communications Commission and the United States of America to the filing of a brief *amicus curiae* by MPC has also been obtained.

The interest of MPC in this matter results from a statutory obligation to represent the interests of Maryland's residential ratepayers before federal and state agencies and courts (Article 78, § 15 Md. Ann. Code 1982). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by Petitioners is to curtail the ability of the states to secure for residential users quality telephone service at reasonable rates. Accordingly, MPC is uniquely qualified to represent the interests of Maryland's residential ratepayers who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

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INTEREST OF THE
MARYLAND OFFICE OF PEOPLE'S COUNSEL

The Maryland Office of People's Counsel is an agency of the State of Maryland created to protect the interests of Maryland's residential and noncommercial users of telephones and other regulated services in proceedings before federal and state agencies and courts. Art. 78 § 15 Md. Ann. Code (1982). The Federal Communications Commission decision in *Second Computer Inquiry*¹ which was

¹ In *The Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) dramatically alters the structure of the telecommunications industry and the framework for regulating that industry. In addition to changing the relationship between Maryland's residential customers and their telephone company, the *Second Computer Inquiry* decision also deprives Maryland residential customers of certain regulatory protections instituted by their State government. Specifically, this FCC decision preempts state regulatory authority over customer premises equipment, i.e., the telephone instrument itself. Accordingly, MPC is vitally interested in the disposition of the pending Petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of Congress.

SUMMARY OF ARGUMENT

Petitioners Louisiana Public Service Commission *et al.* have identified a novel federal question whose answer profoundly affects the Congressionally intended apportionment of regulatory authority over the telecommunications industry between the individual states and the Federal Communications Commission (hereinafter "FCC"). MPC supports the position of the Petitioners that the FCC does not possess the requisite legal authority to change the policy objectives of the Communications Act and to preempt state regulation of customer premises equipment.

Because of the clear Congressional intent to reserve for the states autonomous regulation of intrastate telecommunications, the potential impediment to promulgating the FCC policy presented by continued state regulation of customer premises equipment cannot be interpreted as an obstruction which must give way to federal prerogatives as the FCC has argued. Instead, independent state regulation

must be understood as the embodiment of a federal policy which was unambiguously articulated and implemented by Congress. Accordingly, MPC respectfully urges this Honorable Court to grant the Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and reaffirm the longstanding principle that a federal agency may not preempt state regulatory authority without a clear Congressional intent that it do so.

ARGUMENT

THE FCC MAY NOT PREEMPT STATE RATEMAKING AUTHORITY WITHOUT A CLEAR CONGRESSIONAL MANDATE.

The Supremacy Clause (Art. VI, cl.2) of the Constitution of the United States of America which establishes superior federal jurisdiction in the field of commerce, has been held to extend Congressional power to intrastate activities which so affect commerce that federal regulation of those activities is appropriate. *U.S. v. Darby*, 312 U.S. 100 (1941); *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942). However, this sweeping authority may not be cavalierly or injudiciously invoked by administrative fiat or extrapolated from ambiguous congressional silence. Instead, the courts approve this broadest of intrusions upon state regulatory authority only in the clearest of cases:

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits *no other conclusion*, or that the Congress has *unmistakably so ordained*. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). (emphasis added)

Rate regulation of the interstate telephone service is vested in the Federal Communications Commission pur-

suant to the 1934 Communications Act, 47 U.S.C. §§ 151 *et seq.* However, it is well established that the states retain exclusive jurisdiction over rates for intrastate telephone service by the unambiguous, explicit language of the 1934 Act which created the FCC and delineated the bounds of its authority. *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U.S. 471 (1936).

The Communications Act provides the FCC with responsibility for the development of accounting systems and rules and to provide the FCC with ratemaking jurisdiction only for interstate service. The Act explicitly reserves intrastate ratemaking to the states: ". . . nothing in this Act shall be construed to apply or give the FCC jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . ." 47 U.S.C. § 152(b).

In 1934 when the Act was passed, Congress anticipated consolidation or merger of telephone companies and recognized that such reorganization could cloud once clear divisions between intrastate and interstate service. Here too, the Congressional intent to reserve intrastate ratemaking to the states was expressly set out. Section 221 of the Act, 47 U.S.C. § 221, deals with merger and consolidation. In subsection (a) the Act authorized and required the FCC to certify the consolidation, control or merger but, limited the scope of FCC authority by explicitly protecting state jurisdiction: "Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies." 47 U.S.C. § 221(a). Furthermore, language parallel to that in § 152(b), was added as a separate subsection, 47 U.S.C. § 221(b), specifically reserving intrastate ratemaking to the states where metropolitan exchanges crossed state lines. Thus, Congress was very careful to protect the States' ratemaking jurisdiction with

explicit language in the general reservation section, 47 U.S.C. § 152(b), and in the other ratemaking sections, 47 U.S.C. § 221(a) and § 221(b) where silence might otherwise have caused confusion.

Based upon an aggressive interpretation of its own authority the FCC seeks to implement policy objectives adopted in its *Second Computer Inquiry*, *supra*, by preempting state regulation without regard for the clear Congressional protections against such intrusions. In affirming this contested FCC action, the United States Court of Appeals for the District of Columbia Circuit has ignored its own, previously stated reluctance to defer to FCC interpretations of the Communications Act which expand the scope of its own authority notwithstanding statutory interpretation principles which would normally accord such deference:

"While we do not quarrel with the general proposition, which has been affirmed several times in the courts, [footnote omitted] we hasten to add it is not a license to construe statutory language in any manner whatever, to conjure up powers with no clear antecedents in statute or judicial construction nor to ignore explicit statutory limitations on Commission authority." *NARUC v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976).

Clearly, FCC preemption of state regulatory authority concerning customer premises equipment has not been unmistakably ordained by Congress. Quite the contrary, state regulatory authority in this matter has been explicitly protected by Congress as an integral element of the national framework for telecommunications regulation.

CONCLUSION

If permitted to stand the decision of the United States Court of Appeals for the District of Columbia Circuit affirming FCC preemption of state regulatory authority over customer premises equipment — unsupported by any Congressional mandate — will profoundly compromise the states' role in the national telecommunications regulatory framework as envisioned by Congress. Therefore, the Maryland Office of People's Counsel respectfully requests that this Court issue the requested writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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Nos. 82-1331 & 82-1352

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IN THE
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**BRIEF OF AMICUS CURIAE PUBLIC COMMISSION
OF THE DISTRICT OF COLUMBIA IN SUPPORT OF
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QUESTIONS PRESENTED¹

1. Where the rate regulation of certain offerings of communications common carriers has historically been the exclusive prerogative of the states, with a federal regulatory agency created by Congress to exercise regulatory power in those areas that cannot be reached by state regulatory agencies, may the federal agency adopt a new policy of "non-regulation" of these offerings, and while declining to exercise its own jurisdiction, issue preemption orders that preclude the states from exercising their regulatory powers?

2. Whether the Court below erred in holding that the Federal Communications Commission's preemption of State regulatory authority to tariff customer premises telephone equipment is a legitimate exercise of the Commission's jurisdiction under the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976).

¹The first question presented is that presented by the petitioner in No. 82-1331. The second question presented is that presented by the petitioners in No. 82-1352. While the two questions overlap, the Public Service Commission of the District of Columbia urges the court to grant both petitions, encompassing both questions, so it is able to consider all aspects of the preemption issue.

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IN THE
Supreme Court of the United States
OCTOBER TERM 1982

Nos. 82-1331 & 82-1352

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

**BRIEF OF AMICUS CURIAE PUBLIC COMMISSION
OF THE DISTRICT OF COLUMBIA IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Public Service Commission of the District of Columbia ("the D.C. Commission") respectfully suggests that the court should issue a writ of certiorari to review that part of the decision of the United States Court of Appeals for the District of Columbia Circuit which sustains the authority of the Federal Communications Commission to ban state regulatory commissions from regulating customer premise equipment ("CPE").

The D.C. Commission, like other state and local public utility regulatory agencies, has the authority and responsibility for the regulation of public utilities doing business in the District of Columbia.² The essential function and purpose of the D.C. Commission is

. . . To insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished . . . shall be reasonable, just and non-discriminatory.³

Among the utilities subject to regulation by the D.C. Commission is The Chesapeake & Potomac Telephone Company, a subsidiary of American Telephone & Telegraph Co., which offers local telephone service in the District of Columbia. The D.C. Commission's primary regulatory responsibilities for telephone and telegraph companies are set out in D.C. Code §§ 43-501 - 43-623 and 43-1401 *et seq* and include the regulation and tariffing of public utility services. See *The Chesapeake & Potomac Tel. Co. v. Public Service Commission*, 378 A.2d 1085 (D.C. App. 1977); *Classified Directory Subscribers Ass'n v. Public Service Commission*, 383 F.2d 510 (D.C. Cir. 1967).

This case and the related case of *United States v. American Tel. & Tel. Co.*, *aff'd sub nom. Maryland v. United States*, ____ U.S. ____, 103 S.Ct. 1240 (1983) ("The A.T.&T. Case"⁴) drastically alter the regulatory

²D.C. Code §§ 43-401 *et seq.* (Michie Ed. 1981).

³D.C. Code § 43-402.

⁴The D.C. Commission was an intervenor in the A.T.&T. case.

responsibilities and authority of the D.C. Commission and other state commissions.⁵ The Final Order of the F.C.C. sustained by the court of appeals reduces the D.C. Commission's jurisdiction to regulate a significant segment of heretofore tariffed offerings of the local telephone company. The Commission believes that this forced deregulation will ultimately injure local rate payers, particularly individual, non-commercial telephone users, by requiring increases in basic rates. It is also interested in what it believes to be an unwarranted, improper and sudden usurpation of regulatory authority by the F.C.C. in an area heretofore reserved for state and local regulation.⁶

STATEMENT OF THE CASE

While the F.C.C. orders sustained by the court of appeals address several loosely related subjects, the issues presented by the petitions concern only the F.C.C.'s decision to force state and local commissions to deregulate CPE. The F.C.C.'s reasoning is important for the issues before the court. Having concluded that its *Computer I* rules were unworkable and that the wide variety of CPE

⁵Although created by Act of Congress, the D.C. Commission functions like a state commission, regulating local telephone service.

⁶The F.C.C. did not initially give notice of its intent to consider broad preemption of state and local authority to tariff CPE until its Final Decision. *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980). The D.C. Commission was not a party before the F.C.C. and did not initially seek to intervene on appeal. After the district court modified the decree in the A.T.&T. case, the great changes being made in State and local regulatory jurisdiction of telephone service became apparent to the D.C. Commission and it sought to intervene in the court of appeals in this case. By that time, the court of appeals had already heard argument, and it denied the D.C. Commission's motion to intervene.

available made a classification scheme for carrier — provided CPE unwise, the F.C.C. decided that carrier — provided CPE was not a common carrier service subject to Title II (tariff) regulation. 77 F.C.C.2d at 438-439. The F.C.C. then concluded that the offering of CPE in conjunction with regulated carrier services (“bundling”) directly affects rates for interstate services when such equipment is subject to the separations process. 77 F.C.C.2d at 446. The F.C.C. then announced that carrier — provided CPE would be unbundled, that is, charged separately from the bill for other carrier services and, once unbundled, could only be provided for on a detariffed, that is, deregulated, basis. This deregulation affects not only the F.C.C. but also state and local commissions, because, in order to achieve detariffing of CPE, the F.C.C. order prohibits state and local commissions from tariffing CPE. 77 F.C.C.2d at 445-455.

Only a portion of the court of appeals’ opinion addresses the issue of whether the F.C.C. is authorized to preempt state and local regulation of CPE by an order which forbids state and local commissions from tariffing CPE.⁷ See A28 - A42. The court of appeals correctly points out that, having concluded that it could not impose price regulation of carrier — provided CPE pursuant to Title II, the F.C.C.’s regulatory jurisdiction was ancillary.⁸ A-29 - A-32. The court of appeals’ reasoning in sustaining F.C.C. preemption is essentially that CPE has both intrastate (local) and interstate use and that nothing

⁷References are to the reprint of the court of appeals’ opinion appended to the petition in No. 82-1331.

⁸The F.C.C. has long been recognized to have the power to regulate some communications — related entities not included in the Federal Communications Act on the theory that the regulation is a necessary adjunct to its exercise of its statutory regulatory duties. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

in the Federal Communications Acts provisions reserving State regulatory authority⁹ prevents the F.C.C. from asserting full jurisdiction over dual use CPE. A-34 -A-42.

SUMMARY OF ARGUMENT

The F.C.C. action which the court of appeals approved marks a striking departure from prior practice. In the past, recognizing that CPE has both interstate and intrastate aspects, the F.C.C. has agreed that the states bear primary responsibility for regulating CPE. The few exceptions have been in regard to issues particularly affecting interstate matters.

The F.C.C.'s choice of mode of preemption in this case — creation of a regulatory vacuum — is a method which this court has largely disfavored. In the one instance in which this court approved it, Congress quickly overruled the decision.

A factor strongly weighing in favor of granting the writ is the importance of this case. The F.C.C. rules approved, together with the recent changes mandated by approval of the A.T.&T. decree modification, sharply restrict the role of the states in telephone regulation. This case is too important — both in terms of the preemption precedent and of the effect it will have on telephone service in the entire country — to be finally decided with only the cursory attention of the two judges who decided it in the court of appeals.

⁹47 U.S.C. §§ 152(b)(1) and 221(b).

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

1. The Traditions of Federal and State Regulation

By its decision in this case the F.C.C. has overturned and abrogated a clear, settled and well-understood practice of non-interference by the F.C.C. or its predecessors in rate regulation of CPE by state and local regulatory authorities. That practice of according the states great latitude in setting rates extended as far back as 1910, when the Congress first enacted regulatory legislation in the telephone field,¹⁰ and continued through 1934 with the adoption of the Federal Communications Act¹¹ and then on until May 2, 1980 when the Commission released the Order in question, reported at 77 F.C.C.2d 384 (1980).

The few, sporadic cases relied upon by the F.C.C. to support the unprecedented usurpation of power in this proceeding in fact show, if anything, a sensitivity to the role of the states in regulating CPE, and do not, therefore, provide a basis for the extraordinary action taken by the F.C.C. here. None of these cases involves a situation where state regulation was pitted against federal regulation of CPE. The F.C.C. in those cases asserted regulatory jurisdiction — if at all — not to throttle or thwart state regulation of CPE but rather to force A.T.&T. and other telephone companies to permit attachment of non-carrier provided CPE to the telephone system ("foreign attachments") or to regulate CPE in those special and unusual cases where the CPE was, as found by the F.C.C. as a matter of fact, to be exclusively or predominantly

¹⁰Act of June 18, 1910 ("the Mann - Elkins Act") ch. 309, § 7, 36 Stat. 544 (1910).

¹¹47 U.S.C. §§ 151 *et seq* (1976).

used in interstate communications. A brief review of these cases shows conclusively that they cannot support the F.C.C. decision below.

In *Use of Recording Devices*, 11 F.C.C. 1033 (1947) a "foreign attachments" case, the F.C.C. asserted jurisdiction regarding the use of recording devices in connection with interstate and foreign message toll telephone service. While rejecting the contention that the states had exclusive regulatory jurisdiction over the matter, the F.C.C. noted that by the use of on-and off-switches, subscribers could easily limit the use of recording devices to interstate and foreign calls.

Accordingly, State and other local and regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls. Whether . . . a user with a recording device will employ it on intrastate, as well as interstate and foreign calls, obviously depends on the position taken in the matter by the appropriate local authorities.

(11 F.C.C. at 1047).

In *Jordaphone Corp of America v. A.T.&T.*, 18 F.C.C. 644 (1954), another "foreign attachments" case, this time involving automatic telephone answering devices, the F.C.C. asserted jurisdiction but declined to regulate. The Commission clearly recognized a "joint jurisdiction" with the states (18 F.C.C. at 670), and held that it would not regulate "unless the record reveals a very clear need for such action." (*Id.*) The F.C.C. noted that with rare exceptions these devices would be used to answer intrastate and local exchange calls more often than they would be used to answer interstate and foreign toll calls and, therefore, the F.C.C. properly left it to state and local authorities to

decide whether to allow the use of these devices. (18 F.C.C. at 671).

Three years later in *Hush-A-Phone Corp. v. A.T.&T.*, 22 F.C.C. 112 (1957), yet another 'foreign attachment' case involving devices to, *inter alia*, screen out extraneous ambient noises, the F.C.C., following the mandate in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956), ordered A.T.&T. to file tariffs so as to allow the use of any device which does not injure A.T.&T.'s employees, facilities, the public use of A.T.&T.'s services, or impair the operation of the telephone system. Nothing in the order directed that the states follow or not follow a particular regulatory approach.

In *Doniphan Tel. Co. v. A.T.&T.*, 34 F.C.C. 949 (1963) the F.C.C. recognized that all CPE can at one time or another be used in interstate commerce. However, it went on to say that Congress had worded the 1934 Act "to reserve for State regulatory authorities jurisdiction over that part of the telephone industry which relates to exchange and intrastate telephone activities" (34 F.C.C. at 967). Accordingly, the Commission refused to mediate a dispute between the local telephone company and A.T.&T. regarding interconnections between the two systems.¹²

¹²In *A.T.&T.-Railroad Interconnection*, 32 F.C.C. 337 (1962) the F.C.C. did assert jurisdiction over exchange facilities to the extent that such were used in interstate toll communications. One observes that the railroads themselves were engaged rather directly in interstate commerce and that their communications over their specialized telephone systems would be, to a considerable degree, interstate in character. Nothing in this case, therefore, cuts off or preempts appropriate state regulation and nothing in the order implies such a result.

A concern for the proper balance of state and federal regulation continued in *A.T.&T. — T.W.X.*, 38 F.C.C. 1127 (1965) where the F.C.C. asserted jurisdiction over the charges made by A.T.&T. for typewriter exchange service ("T.W.X."). The F.C.C. found that T.W.X. service was "predominantly interstate in its use." (38 F.C.C. at 1133)

In *General Telephone Company*, 13 F.C.C.2d 448 (1968) the F.C.C. held that channel (i.e. private line) service offerings by telephone companies to cable television ("CATV") systems constituted interstate common carriage and that the lines were "interstate" within the meaning of § 214 of the 1934¹³ Act. Here, too, the predominant use — CATV transmission — was interstate as this Court in effect ruled in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).¹⁴

In *United States Department of Defense v. General Telephone Company*, 38 F.C.C.2d 803 (1973), *review den.* F.C.C. 73-844, *aff'd per curiam sub nom. St. Joseph Telephone & Telegraph Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir. 1974), the F.C.C. asserted jurisdiction to regulate the charge for dial restoration panel ("DRP") equipment, a species of CPE. The F.C.C. found, as in *A.T.&T. — T.W.X.*, *supra*, and *General Telephone Company*, *supra*, that the predominant use of this CPE was interstate. DRP was a portion of the Air Force's nationwide air defense

¹³74 U.S.C. § 14.

¹⁴In its Order on Reconsideration, 14 F.C.C. 2d 695 (1968) the F.C.C. was careful to note that CATV service was essentially separate and apart from other telephone service and facilities and that regulation of CATV service would not impinge upon state regulation of such other service and facilities. 14 F.C.C.2d at 697. The F.C.C.'s actions there were upheld in *General Telephone Co. v. F.C.C.*, 413 F.2d 390 (D.C. Cir. 1969), *cert. den.* 396 U.S. 888 (1970).

system and was primarily designed for interstate use, and communications over the system were primarily related to this interstate, national defense purpose. (38 F.C.C.2d at 813) The special facts relating to DRP clearly controlled the outcome of the case and the proper balance between state and federal regulation of CPE is left undisturbed by the decision.¹³

2. The Regulatory Vacuum

The F.C.C. action which the court of appeals sanctioned took an unusual form. First, the F.C.C., in the name of administrative convenience and policy (fostering competition) decided that it should not regulate CPE. Then, in the name of the same policy, it decided that state and local commissions could not regulate CPE either. As a result, it created a regulatory vacuum.

The D.C. Commission has discovered only one instance in which this court has sustained the authority of a federal

¹³Reliance on the F.C.C.'s more recent decisions on foreign attachments — *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), *cert. den.* 97 S.Ct. 651 (1976), and *Interstate and Foreign Message Toll Telephone*, First Report & Order in Docket No. 19258, 56 F.C.C.2d 593 (1975), *on reconsideration*, 57 F.C.C.2d 1216 (1976), 58 F.C.C.2d 716 (1976) and 59 F.C.C.2d 83 (1976) and Second Report & Order in Docket No. 19258, 58 F.C.C.2d 736, *on reconsideration, aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977), *cert. den.* 98 S.Ct. 222 (1977) — is misplaced. *Amicus curiae* agrees with the appellants that those decisions do not preempt state rate regulation of CPE. Indeed the Fourth Circuit took great pains to point out that they do not do so. See, e.g., 537 F.2d at 793 n. 6; 552 F.2d at 1048.

agency to preempt state regulation by creation of a regulatory vacuum. See *Guss v. Utah Labor Board*, 353 U.S. 1 (1956). As Mr. Justice White pointed out in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 155 (1971) (dissenting opinion), "Congress' swift overruling of the Court's decision in *Guss*... should make the court approach with great caution the creation of another 'vast-no-man's land, subject to regulation by no agency or court.'" Although the issue has not come up often, this court's earlier statements on the subject read strongly against the creation of regulatory vacuums by implication of Congressional intent. See, e.g., *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19 (1962); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). The only case in this court touching on the subject of regulatory vacuum in the telephone field is *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U.S. 471 (1936). The federal statute authorized the I.C.C. to establish depreciation rates for telephone plant, and the utility contended that, even though the I.C.C. had not adopted regulations, the passage of the statute preempted state adoption of depreciation rates for utility plant. The court rejected the preemption argument, holding that the states would be preempted only if the I.C.C. actually adopted regulations on the subject.

While none of the cases just cited are identical to this one, they point up the fact that the device chosen by the F.C.C. to preempt state regulation — the creation of a regulatory vacuum — is one which this court has generally rejected.

Expression in circuits other than the District of Columbia Circuit likewise weighs against sanctioning regulatory

vacuums. The most thorough consideration of the subject is the Second Circuit's decision in *New York Telephone Co. v. F.C.C.*, 631 F.2d 1059 (2d Cir. 1980). There, the New York Commission had asserted jurisdiction over interstate foreign exchange and common control switching arrangements services, a species of private line services, based on the connection to local telephone exchanges. The F.C.C. issued a preemption order. New York telephone argued that the F.C.C. could not preempt state regulation without adopting its own tariff on the subject, "[t]hat is to say, the agency may not 'preempt state regulations without itself occupying the field by effective regulations.'" 631 F.2d at 1066. The Second Circuit agreed with the foregoing proposition, *id.*¹⁶ but, in examining the F.C.C.'s ruling, read it to mean that the F.C.C. had provided effective tariff regulation of the service by authorizing the company to apply to the F.C.C. for approval of the company's proposed charge. 631 F.2d at 1067.

The regulatory vacuum issue was discussed extensively at oral argument of this case. The questions of Judge Edwards,¹⁷ in particular, pointed up that the F.C.C. was asking the court to accept an unusual form of preemption, particularly when its basis for asserting even joint regulatory jurisdiction was not Title II but ancillary.

¹⁶In addition to examining this court's decisions, which are discussed above, the Second Circuit opinion examines the court of appeals cases on preemption of state highway safety regulation by the federal Department of Transportation which hold that a state is not preempted from adopting safety regulations on a subject unless there is an adopted federal regulation. See *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 316 (1st Cir. 1969).

¹⁷Circuit Judge Edwards was part of the division which heard argument, but he did not participate in the decision.

Despite the court of appeals' full awareness of the regulatory vacuum issue, it is not even considered in the opinion.

3. The Importance of the Decision of the Court of Appeals

This is an extremely important case; together with the A.T.&T. case,¹⁸ it marks a dramatic reduction in the authority of state regulators to regulate local telephone companies. Unlike the F.C.C.'s decision in the *Computer I* case, in which the Second Circuit subjected the F.C.C.'s rules to close examination and invalidated a portion of them because the F.C.C. had improperly expanded the concept of its ancillary jurisdiction, see *GTE Service Corp. v. F.C.C.*, 474 F.2d 724 (2d Cir. 1973), the decision of the court of appeals in this case defers to the F.C.C. without seriously examining what the F.C.C. has done. Authored by a single court of appeals judge with the concurrence only of a visiting district judge, the court of appeals' decision makes no analysis of the unusual and far reaching nature of the F.C.C.'s decision. The F.C.C., however, fully understands the broad authority which the court of appeals has given it, because it has already used it as a basis for preempting state commission authority in other areas heretofore reserved for state regulation. See, e.g., *In the Matter of Amendment of Part 31*, ____ F.C.C.2d ____ (Order No. 82-581 in CC Docket No.

¹⁸The district court approved a decree modification in A.T.&T. which substantially supplanted state commissions' regulatory authority and which removed embedded CPE from the rate base of the local telephone companies subject to state commission jurisdiction. Three members of this court dissented from the affirmance without plenary consideration on the state preemption point. *Maryland v. United States*, ____ U.S. ____, 103 S.Ct. 1240 (Feb. 28, 1983).

79-105 released Jan. 8, 1983), appeal pending sub nom. *Virginia State Corporation Commission v. F.C.C.*, 4th Cir. No. 83-1136 (depreciation rates for equipment owned by local telephone companies); *In the Matter of MTS and WATS Market Structure*, ____ F.C.C.2d____ (Order No. 82-587 in CC Docket No. 78-72, Phase I, Released Feb. 28, 1983), appeal pending, *National Association of Regulatory Utility Commissioners v. F.C.C.*, D.C. Cir. No. 83-1225 and *Public Service Commission of the District of Columbia v. F.C.C.*, D.C. Cir. No. 83-1339 (substituting access charges for joint board separation procedures.)

While the point is properly made that the F.C.C. should not be permitted to take from state commissions regulatory authority which Congress specifically reserved to them when it adopted the Federal Communications Act, see *North Carolina Utilities Commission v. F.C.C.* 537 F.2d 787, 799 (4th Cir. 1976) (dissenting opinion of Judge Widener), this case has other equally important dimensions. The state and local commissions have traditionally assumed the role of serving the "universal telephone service" goal by assuring that basic exchange services, which are used by individual telephone users, are kept at affordable levels. See, e.g., *Re The Chesapeake & Potomac Tel. Co.*, 43 PUR 4th 169 (D.C.P.S.C. 1981). The predictable result of broad F.C.C. preemption and the actions it has taken in the present case and its other recent preemption decisions will be deprive the state and local commissions of the ability to serve the universal service goal by keeping basic exchange rates affordable. The beneficiaries will be the users and offerors of long distance and sophisticated business services. The far reaching changes the F.C.C. is making are based on a very tenuous view of preemption, and this court should examine very

carefully the legitimacy of that view before sanctioning its implementation.

CONCLUSION

These cases clearly merit issuance of the writs of certiorari.

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Nos. 82-1331 and 83-1352

ALEXANDER L. STEVENS,
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
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FEDERAL COMMUNICATIONS COMMISSION
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NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, THE PEOPLE OF THE
STATE OF CALIFORNIA AND THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF
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FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
ET AL.,

Respondents.

IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND BRIEF
OF THE SOUTH CAROLINA DEPARTMENT
OF CONSUMER AFFAIRS AS AMICUS CURIAE

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Nos. 82-1331 and 83-1352

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents,

and

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, THE PEOPLE OF THE
STATE OF CALIFORNIA AND THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
ET AL.,
Respondents.

IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The South Carolina Department of Consumer Affairs "Department" respectfully moves for leave to file the attached brief amicus

curiae in support of the request of the Petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, et al. (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the Petitioners to the filing of a brief amicus curiae by the Department has been obtained. The consent of Respondents Federal Communications Commission and the United States of America to the filing of a brief amicus curiae by the Department has also been obtained. These letters of consent accompany this brief and are being filed in the Office of the Clerk. The brief is being submitted in a timely manner and in compliance with Supreme Court Rule 36.1.

The interest of the Department in this matter results from its statutory authority

to represent the interests of South Carolina consumers in civil proceedings involving review of telephone and other matters which may affect South Carolina consumer interests. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1982). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission is to curtail the ability of South Carolina and other states to secure for telephone users quality service at reasonable rates. Accordingly, the Department is best qualified to represent the interests of South Carolina ratepayers who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

WHEREFORE, the Department prays for leave to file a brief amicus curiae in support of the Petitions for a writ of

certiorari to the United States Court of
Appeals for the District of Columbia Circuit.

Respectfully submitted,

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April 15, 1983

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
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NATIONAL ASSOCIATION OF REGULATORY
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IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SOUTH CAROLINA DEPARTMENT
OF CONSUMER AFFAIRS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Department is an agency of the State of South Carolina. The Consumer Advocate and Division of Consumer Advocacy within the Department have been created to protect the interests of South Carolina's users of telephones and other services in civil proceedings involving review or enforcement

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of an agency action that may substantially affect such interest of consumers. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1982). The Consumer Advocate likewise provides legal representation at his sole discretion of consumer interests before the South Carolina Public Service Commission ("SCPSC") when it undertakes to fix rates or prices for consumer telephone products or services or to enact regulations or establish policies related thereto. S.C. CODE ANN. §37-6-604 (Cum. Supp. 1982). Because the Federal Communications Commission ("FCC") has preempted State regulatory authority to tariff customer premises telephone equipment, and the United States Court of Appeals for the District of Columbia has upheld this action,¹ the interests which the Department is statutorily obligated to protect are significantly and unquestionably affected. The FCC has since issued certain orders in which it has expanded this notion of its preemptive authority.²

¹Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982) ("Computer II"). Review is sought for this case and in the six cases consolidated therewith, as cited in the petitions for a writ of certiorari. The case began as an FCC rulemaking proceeding.

²Memorandum Opinion and Order In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the

If this decision is allowed to stand, it will continue to have serious consequences by precluding the Department from urging the SCPSC to continue to exercise its lawful authority regarding the tariffing of customer premises equipment ("CPE") and the setting other telephone rates, charges, and methodologies for intrastate ratemaking purposes as intended by both the SCPSC telecommunications statutes and the Communications Act of 1934. S.C. CODE ANN. §58-9-10 et seq. (Law Co-op. 1976) and 47 USC §151 et seq. (1976).

Finally, the Department's interest will not be adequately represented by existing parties. Respondents FCC and the United States of America seek denial of the petitions for writ of certiorari. This is obviously adverse to the Department's statutory interest regarding intrastate rates for telephone service. Petitioners are either state public utilities commissions or the State's National

Commission's Rules and Regulations with Respect to Accounting for Station Connections, Optional Payment and Planned Revenues and Related Capital Costs, Customer Provided Equipment and Sales of Terminal Equipment, CC Docket No. 79-105 (RM-3017), FCC 82-581 (released January 6, 1983) (preempting State depreciation charges) ("Reconsideration Order") and Third Report and Order In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 82-579 (released February 28, 1983) (imposing a flat access charge on non-interstate callers) ("Third Report"). See Separate statement in Third Report of Commissioner Anne P. Jones, issued April 4, 1983; but see United States of America v. American Telephone and Telegraph Company, 552 F.Supp. 131, 169, n. 161 (D.D.C. 1982).

Association of Regulatory Utility Commissioners ("NARUC"). As such, petitioners must balance the interests of telephone consumers and the interests of the telephone utilities in ratemaking decisions. Thus, only the Department as amicus curiae can adequately represent the interests of South Carolina consumers of telephone service. The Department is honored to have the opportunity to support the issuance of a writ of certiorari in a case of such significant historical importance and with such wide-ranging social ramifications.

SUMMARY OF ARGUMENT

There are at least three special and important reasons that the Court should issue a writ of certiorari. First, the Court's supervision is necessary to provide guidance in light of the court of appeals affirmance of the FCC's extreme departure from its historical interpretation of the extent of its ancillary jurisdiction under the Communications Act of 1934. Second, the legislative history of the Act may not support FCC preemption of State tariffing of CPE. Third, by its affirmance of the preemption ruling the court of appeals has effectively rendered a decision in which its reasoning may conflict with the reasoning in two decisions by the Fourth Circuit Court of Appeals interpreting the Communications Act of 1934.³

³North Carolina Utilities Commission v. Federal

ARGUMENT

I. THIS COURT'S GUIDANCE IS NECESSARY TO CLARIFY THE EXTENT OF THE FCC'S ANCILLARY JURISDICTION UNDER THE COMMUNICATIONS ACT.

The Court's supervision is necessary to provide guidance in light of the court of appeals affirmance of the FCC's extreme departure from its historical interpretation of the extent of its ancillary jurisdiction under the Communications Act of 1934. In its order setting forth policy reasons for affirming the FCC's preemptive ruling, the court of appeals has not included sufficient underlying facts to support its reasoning. Therefore, remand of this case may be necessary before the Court can offer specific guidance. The need for guidance on this important question of statutory construction of Federal law, however, it made more acute due to more recent FCC decisions concerning depreciation (Reconsideration Order) and access charges (Third Report) by which the Federal agency is continuing to expand its jurisdiction under the Act.

The Court granted certiorari in United States v. Southwestern Cable Co., 392 U.S.

Communications Commission, 537 F.2d 787 (4th Cir.), cert. denied, 419 U.S. 1027 (1976) ("NCUC I") and North Carolina Utilities Commission v. Federal Communications Commission, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) ("NCUC II").

157, 88 S.Ct. 1994 (1968), to consider an important question of the FCC's regulatory authority under the Communications Act emanating from rules the FCC had promulgated. 392 U.S. at 160-161. The Court reversed the holding of the Ninth Circuit Court of Appeals that the FCC lacked authority under Section 152(a) of the Act to issue an order prohibiting expansion of a television station's community antenna television (CATV) systems, although the Court stated it was restricting the authority it was recognizing "to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. The need for the Court to clarify the extent of the FCC's jurisdiction under §152(a) has once again arisen because of its action, affirmed by the court of appeals, preempting State tariffing of CPE.

Section 152(a) states that the "provisions of this chapter shall apply to all interstate ... communication by wire or radio ...," while §153(a) defines "communication by wire" to include not only transmission but also "all instrumentalities, facilities (and) apparatus ... incidental to such transmission." 47 U.S.C. §§152(a) and 153(a) (1976).

On the other hand, Section 152(b) states in part:

Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

47 U.S.C. §152(b) (1976).⁴ In addition, Section 221(b) excludes State regulated jointly-used equipment from the FCC's jurisdiction:

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classification, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. §221(b) (1976).

In the Computer II scheme, discontinuation of Title II regulation of CPE and exertion of ancillary jurisdiction under Sections 152 and 153 over carrier-provided CPE by the

⁴ Section 224 concerns pole attachments and Section 301 concerns licenses for radio communication or transmission of energy, i.e. broadcasting.

FCC is one thing, while FCC preemption under these Sections over historically State regulated CPE is quite another. The Court should clarify how Sections 152 and 153 and 221(b) should be read individually and collectively and thereby clarify the extent of the FCC's ancillary jurisdiction under the Act.

The Department agrees with the court of appeals that the field of telecommunications is "volatile and highly specialized." Computer II, 693 F.2d at 209. It seriously doubts, however, whether the broad authority given the FCC under Section 152(a) can be expanded by policy reasons because of the volatile evolution of this field or because it determined the FCC's regulations were not arbitrary or capricious (Id. at 217), especially in light of the express language of Sections 152(b) and 221(b). Even if the court is inclined to consider how the definition of terms in these Sections may change in the volatile field of telecommunications, the Department then questions whether the Court can offer proper guidance without additional facts - if they are in the record - to support the court of appeals affirmance of the FCC's expanded definition of its ancillary jurisdiction. Remand may be necessary to determine more clearly: exactly how state tariffing of CPE

would frustrate the Computer II scheme (Id. at 214); how the inclusion of CPE in charges for intrastate transmission service will "certainly influence the consumer's choice of CPE" (Id. at 215); whether the FCC's belief is supportable that state tariffing of CPE is detrimental to both the consumer and the interstate communication system (Id. at 215); and what the impact will be if the telephone operating companies after divestiture begin to sell CPE through some new subsidiary or otherwise.⁵ Even with this additional information, however, the Court might ultimately decide legislative changes to the Act would be necessary to clarify the Federal-State jurisdictional line.

Finally, guidance is needed since the FCC has already used the Computer II preemption notion as a springboard in two other decisions, the Reconsideration Order and Third Report, both decided in early 1983. Appeals have been filed in both of these matters. Virginia State Corporation Commission v. Federal Communications Commission and United States of America, Civ. No. 83-1136 (4th Cir., filed February 15, 1983) (challenging FCC

⁵ As to divestiture See United States of America v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland et al. v. United States, et al., 51 U.S.L. W. 3632 (U.S. Feb. 28, 1983) (Nos. 82-952, 82-953, 83-992, and 81-1001).

preemption of State depreciation rates) and National Association of Regulatory Utilities Commissioners v. Federal Communications Commission and United States of America, Civ. No. 83-1225 (D.C. Cir., filed March 1, 1983) (challenging FCC establishment of access charge regulations).

II. THE LEGISLATIVE HISTORY OF THE ACT DOES NOT SUPPORT A CONSTRUCTION THAT ALLOWS PREEMPTION OF STATE TARIFFING OF CPE.

Petitioners have amply shown through the statements of Senator Clarence Dill, Representative Sam Rayburn, and others that Congress intended to deny the FCC any power to interfere with State regulation of rates and charges incidental to intrastate communications service. Petition of NARUC at 4-7 and Petition of Louisiana Public Service Commission at 24. This Court has previously held that unambiguous preemptive intent must flow from Congress. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210 (1963).

Even the court of appeals recognized the Congressional intent behind Section 152(b) of the Act. As the court explained:

Several parties attempt to distinguish the NCUC cases on the ground that they did not involve Commission attempts to preempt state ratemaking authority. They argue that section 2(b) prohibits preemption of state tariffing of CPE. They

point out that section 2(b) was designed to protect state authority over intrastate rates, enacted as it was in response to a Supreme Court decision that Congress feared would be read to permit federal agencies to set local rates based on the indirect effects such as rates might have on interstate service.

Computer II, 693 F.2d at 215-26, citing Houston, East & West Texas Railway Company v. United States, 234 U.S. 342, 34 S. Ct. 883 (1914) (Shreveport). The court then noted:

(I)n Shreveport the Supreme Court upheld an ICC order that, in effective, required the revision of intrastate railroad rates that were lower than rates for comparable interstate rail services so as to remove the resulting discrimination against interstate commerce. Congress may well have intended §2(b) of the Communications Act to prevent such a result in the communications area.

693 F.2d at 216, n. 99 (emphasis added).

From this recognition, then, the clearest inference is that the court of appeals was somewhat uncertain about how much this legislative history affected its ability to handle the question of the FCC's ancillary jurisdiction. The Court should therefore resolve this uncertainty by clarifying the matter itself or by suggesting that Congress do it.

III. THE REASONING PROCESS EMPLOYED BY THE COURT OF APPEALS TO REACH ITS DECISION UPHOLDING PREEMPTION MAY CONFLICT WITH THE

PROCESS UTILIZED BY ANOTHER CIRCUIT IN CONSTRUCTING THE COMMUNICATIONS ACT.

In NCUC I and NCUC II the Court of Appeals for the Fourth Circuit examined an FCC plan to exercise its authority over customer-provided terminal equipment to be interconnected with the interstate network. The Fourth Circuit upheld the registration program as a valid exercise within the FCC's statutory jurisdiction. In reaching this determination the court reviewed the scope of Section 152(b) of the Act, as well as the legislative history and implications of Federal control over interconnection. It noted:

Shreveport dealt specifically with rates for services which were admittedly local in nature; this appeal concerns the definition of what services and facilities are "intrastate" and hence subject to state rather than federal control (under Section 152(b)(1)).

NCUC II, 552 F.2d at 1047. Thus, while upholding the FCC's registration program, the Fourth Circuit effectively reasoned that it was not "intrastate" service, i.e. the program did not prescribe any rates for local service, facilities and carrier-supplied terminal equipment. 552 F.2d at 1047-1048.

The Court of Appeals for the District of Columbia reasoned that since Sections 152(a) and (b) of the Act allocated Federal and State authority for both "charges" and "facilities," "conflicting federal and state regulations regarding dual use CPE are no more acceptable

under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the NCUC cases." Computer II, 693 F.2d at 216. As previously argued, the Court may not be convinced that the alleged conflict has been adequately supported with factual information. The court of appeals stated on the one hand that it could not engage in whether a price control or free competition policy better serves the public interest but that it could only determine the FCC's statutory authority. Yet it closely looked at the Computer II scheme, alleged Federal-State conflicts in regulations, and perceived competitive effects in expanding the notion of the FCC's ancillary jurisdiction or at least the exercise thereof.

With its additional recognition and concern that the telecommunications field is "volatile," a type of policy analysis appears clearly at work. However, since the court of appeals failed to deal head on with the finding by the Fourth Circuit that State commissions still had discretion to tariff terminal equipment under Section 152(b), its analysis of the NCUC cases is incomplete at best. This conflict between courts of appeal should, therefore, be resolved by the Court's review of this matter. Without it the FCC may further extend its intrusion into the State

regulatory arena as the telecommunications field continues to evolve. This could, in turn, have the additional ramification of adversely affecting the financial ability of consumers to maintain telephone service.

CONCLUSION

For the foregoing reasons, the Department as amicus curiae urges this court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia in order to review this matter of grave national importance.

Respectfully submitted,

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April 15, 1983

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Nos. 82-1331 and 82-1352

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE;
BRIEF AMICUS CURIAE OF THE
UTAH PUBLIC SERVICE COMMISSION
IN SUPPORT OF THE
PETITIONS FOR WRIT OF CERTIORARI OF THE
LOUISIANA PUBLIC SERVICE COMMISSION,
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
AND THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

BRENT H. CAMERON, *Chairman*
DAVID R. IRVINE, *Commissioner*
JAMES M. BYRNE, *Commissioner*
IN SUPPORT OF PETITIONERS

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**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
IN SUPPORT OF THE PETITIONS FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

The Utah Public Service Commission (hereinafter UPSC) respectfully moves for leave to file the attached brief *amicus curiae* in support of the request of the petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, *et al.* (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the petitioners to the filing of a brief *amicus curiae* by UPSC has

been obtained. The consent of the respondents Federal Communications Commission and the United States of America to the filing of a brief *amicus curiae* by UPSC has also been obtained.

The interest of UPSC in this matter results from its role as a state regulator of utilities (Utah Code Ann., §54-4-1, 1981) and as the agency charged with engaging in formulation of public utility regulatory policy. (Utah Code Ann. §54-1-10, 1983.)

The impact of the decision of the United States Court of Appeals for the District of Columbia Circuit upholding the order of the Federal Communications Commission challenged by the petitioner removes from the states the ability to secure telephone service for state customers at reasonable rates. Therefore, the UPSC is a proper party to represent the interests of Utah's ratepayers who are not parties to this action, but whose interests will be directly affected by the final resolution of the issues in these cases.

Respectfully submitted,

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On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF AMICUS CURIAE OF THE
UTAH PUBLIC SERVICE COMMISSION
INTEREST OF THE
UTAH PUBLIC SERVICE COMMISSION**

The Utah Public Service Commission (UPSC) is an independent agency of the State of Utah charged with the responsibility to regulate public utilities (Utah Code Ann. § 54-4-1, 1981). The Commission engages in long-range planning regarding public utility regulatory policy, (Utah Code Ann. §54-1-10, 1983) and therefore is qualified to represent Utah's regulatory interests and telephone customers.

The *Second Computer Inquiry*¹ as decided by the Federal

¹ In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

Communications Commission and then affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) drastically shifts the traditional structure and methods of regulation in the telecommunication area. This *Second Computer Inquiry* decision removes UPSC's statutory and historic responsibility to assure Utah customers of adequate service at reasonable rates. The decision would effect a fundamental shift of jurisdiction from the state to a federal agency, leaving customers without the protection of state regulation of intrastate service. By not allowing this Commission to regulate customer premises equipment, the FCC decision undermines the result intended by Congress in the 1934 Communications Act, 47 U.S.C. §§151 *et seq.* It radically alters implementation of congressional intent. Public service commissions across the nation consider the various individual and distinctly unique characteristics and problems of each state in formulating rate structures for the telecommunication areas. Because the FCC decision pre-empts state authority to regulate customer premises equipment the UPSC is extremely interested in the resolution of the filed petitions which contend that FCC pre-emption of state regulatory authority in this case is inconsistent with the clear intent of Congress and the FCC's own statutory authority.

SUMMARY OF ARGUMENTS

The petitioners, Louisiana Public Service Commission *et al*, have raised a federal question, resolution of which will substantially determine the manner in which the telecommunication industry is regulated, and whether such is in the manner which has been clearly and unmistakably mandated by Congress.

The potential ramifications of the decision from which

the appeal is taken are enormous, and raise issues which affect virtually every citizen. The impact of the decision, if upheld, may well seriously affect the opportunity of many thousands of customers, especially in sparsely populated areas, to have affordable access to telephone service. For decades this nation has been committed by congressional mandate to the concept of universal telephone service, and historic rate subsidies have made that objective generally attainable. The resultant patterns have evolved over several decades, and the abrupt departure from historic pricing policies by the FCC promises to destroy that national objective. Universal service is such an elemental component of national telecommunications policy that changes, outside of state regulatory purview, if they are to be made at all, should be made by the Congress and until the law is changed, that policy is the law of the land, irrespective of the wishes of a federal agency charged to uphold it. The FCC decision is a frontal assault upon the authority of Congress, and the Court should act to preserve the separation of powers which is in jeopardy.

The UPSC supports the position of the petitioners that the FCC does not possess the required legal authority to change established policy goals of the Communications Act and to pre-empt state regulation of customer premises equipment.

Congress clearly did not intend for pre-emption, nor did the FCC comply with the prerequisites required prior to pre-emption. There was no clear congressional mandate established to allow federal regulation to pre-empt state law.

The Communications Act of 1934 expressly reserved certain areas of the telecommunications industry to state regulatory control and nothing has occurred to modify this congressional directive.

For these reasons, UPSC respectfully urges this Honorable Court to grant the petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and reaffirm the well-established principle that a federal agency may not pre-empt state regulatory authority in the absence of congressional permission that it do so.

ARGUMENTS

I. The FCC Pre-emption of State Ratemaking is Not Pursuant to Clear Congressional Authority.

Congress unquestionably has the power to pre-empt state law by various clauses of the United States Constitution such as the Commerce Clause (Art. I§8,cl.3) and the Supremacy Clause (Art.VI,cl.2). However, because of the general reservation of power by the states through the Tenth Amendment, Congress must have clearly intended to pre-empt state law before the Court allows such action. Therefore, a clear showing of this type of congressional mandate must be established before federal regulations are pre-emptive of state law:

“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits *no other conclusion* or that *Congress has unmistakably so ordained*. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).”
(emphasis added)

Therefore, the FCC's pre-emptive action as a federal administrative agency is valid only if it satisfies the prerequisites for the exercise of pre-emptive power by Congress. Clearly, since administrative agencies receive their authority, from congressional statutes, the power to pre-empt

state law must be given to that agency by Congress. Also, the administrative agency must demonstrate conclusively that the agency action furthers objectives mandated by Congress. In other words, the agency must not act outside of its delegated authority or in a manner inconsistent to that which Congress intended. *State of North Carolina v. United States*, 325 U.S. 507, 655 S.Ct. 1260 (1945). This authority shows that pre-emptive intent must come from Congress and is not easily inferred. The 1934 Act does not provide for action to be taken as it was, and the FCC in the *Second Computer Inquiry*, *supra* clearly did not meet the standards required to permit pre-emption by the FCC over customer premises equipment.

II. Congressional Directives in the 1934 Communications Act Establishing State Ratemaking Authority, were ignored by the FCC.

The Federal Communication Commission by virtue of the 1934 Communications Act, 47 U.S.C. §§ 151 *et seq.* has authority to regulate rates for interstate telephone service. This authority from the Communication Act places with the FCC the responsibility to develop rules, regulations and accounting systems for interstate ratemaking only.

With clear and explicit language Congress established that authority for intrastate telephone service regulation was to be retained by the states.

“nothing in this Act shall be construed to apply or give the FCC jurisdiction with respect to (1) charges, classification, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .” 47 U.S.C. § 152 (b)

Limitation on the FCC's authority over intrastate service is further demonstrated in the Act by Congress's handling

of consolidations or merger of telephone companies. In Section 221 of the 1934 Communications Act; 47 U.S.C. §221, which deals with consolidations and mergers, Congress's intent to leave intrastate rate making to the states is unmistakably and expressly stated. Pursuant to 47 U.S.C. §221 subsection (a) the FCC is to grant the certifications for consolidation, control or merger, but this power is restricted and expressly preserves state jurisdiction:

"Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of several states to control and regulate telephone companies" 47 U.S.C. §221 (a) .

Additional language similar to § 152 (b) was incorporated in a separate subsection, 47 U.S.C. §221 (b) preserving state regulatory control over rates where metropolitan telephone exchanges straddle state borders. Thus, it appears from the language of 47 U.S.C. §152 (b), 47 U.S.C. §221 (a) and (b) , that Congress clearly manifested a definite desire to protect state regulatory jurisdiction over intrastate rate-making from FCC encroachment.

The clear and unmistakable language of the Act has been conveniently overlooked by the FCC in interpreting its own authority and by its attempt to instigate a sweeping new policy. The determinations of terms and conditions of intrastate and local exchange service are state functions, have been reserved to the states by Congress and while the merits of the FCC's action may be arguable, they are issues reserved for state determination, no matter how utilitarian they may appear to the federal administrators.

CONCLUSION

If allowed to stand, the decision of the United States Court of Appeals for the District of Columbia Circuit

affirming FCC pre-emption of state regulatory authority over customer premises equipment — unsupported by congressional mandate and in express violation of the 1934 Communications Act — will profoundly compromise the states' role in the national telecommunications regulatory framework as established by Congress in that Act. Therefore, the Utah Public Service Commission respectfully requests that this Court issue the requested writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully Submitted,

THE UTAH PUBLIC SERVICE COMMISSION

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Nos. 82-1331 and 82-1352

**IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1982**

**LOUISIANA PUBLIC SERVICE COMMISSION,
et. al.,**

Petitioners,

vs.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,**

Respondents.

**On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit**

**Motion For Leave To File Brief Amicus
Curiae; Brief Amicus Curiae Of The
Washington Utilities and Transportation
Commission In Support Of The Petitions
For Writ Of Certiorari Of The Louisiana
Public Service Commission, National
Association Of Regulatory Utility
Commissioners, The People Of The State
Of California and The Public Utilities
Commission Of The State Of California**

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Public Service Commission, National
Association Of Regulatory Utility
Commissioners, The People Of The State
Of California, and The Public Utilities
Commission Of The State Of California

The Washington Utilities and Trans-
portation Commission (hereinafter
"WUTC") respectfully moves for leave to

file the attached brief amicus curiae in support of the request of the petitioners, Louisiana Public Service Commission (case no. 82-1331) and National Association of Regulatory Utility Commissioners, et al., (case no. 82-1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the petitioners to the filing of a brief amicus curiae by WUTC has been obtained. The consent of respondents Federal Communications Commission and the United States of America to the filing of a brief amicus curiae by WUTC has also been obtained.

The interest of WUTC in this matter results from a statutory obligation to represent the interests of the State of Washington, its businesses and

general public in all judicial proceedings in which there is at issue the authority, rates or practices for utility services (Chapter 49 § 1, Laws of Washington of 1967, 1st Ex. Sess., RCW 80.01.075). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by petitioners, is to curtail the ability of the states, including the state of Washington, to secure for itself, its businesses and general public, quality telephone service at rates which are fair, just, reasonable and sufficient. Accordingly, WUTC is uniquely qualified to represent the interests of the state of Washington, its businesses and general public who are not parties to this action but whose interests will be

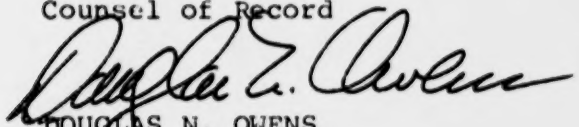
directly affected by the ultimate resolution of the issues presented herein.

Dated this 8th day of April, 1983.

Respectfully submitted,

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ROBERT E. SIMPSON
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Respondents.

BRIEF AMICUS CURIAE

OF THE

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

INTEREST OF THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

The Washington Utilities and Transportation Commission is an agency of the State of Washington which was created to represent the interests of the State of

Washington, its businesses and general public in proceedings before federal agencies and courts in which there is at issue rates or practices for utility service affecting such interests. Chapter 49, Sec. 1, Laws of Washington of 1967, 1st Ex. Sess., RCW 80.01.075. The Federal Communications Commission's decision in the second computer inquiry¹ which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D. C. Cir. 1982) purports to deprive the WUTC of the power to regulate in the public interest the rates, facilities and practices of persons engaging in the provision of

¹In the matter of amendment of section 64.702 of the Commission's rules and regulations (Docket No. 20828), 61 F.C.C. 2d 103 (1976), 64 F.C.C. 2d 71 (1977), 72 F.C.C. 2d 358 (1979), 77 F.C.C. 2d 384 (1980), 84 F.C.C. 2d 50 (1980), 88 F.C.C. 2d 512 (1981).

customer premise equipment for compensation, which are required to be regulated under Washington state law. The FCC, based in part upon the order of which relief is sought by the petitioners in this proceeding, has issued an order purporting to preempt the authority of the states to regulate depreciation expense for the intrastate portion of the operations of telephone companies subject to state jurisdiction. This order, in FCC Docket No. 79-105, released January 6, 1983 in the amendment of part 31, Uniform System of Accounts, was the basis for the entry by the United States District Court for the Western District of Washington of a preliminary injunction against the WUTC, forcing the latter to increase intrastate telephone rates based solely on asserted preemption by the FCC of a power of which has long been recognized

to exist in the states to regulate intrastate depreciation. Therefore, WUTC is vitally interested in the disposition of the pending petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of congress.

SUMMARY OF ARGUMENT

Petitioners Louisiana Public Service Commission, et al., have identified a novel federal question whose answer profoundly affects the congressionally intended apportionment of regulatory authority over the telecommunications industry between the individual state and the Federal Communications Commission (hereinafter "FCC"). WUTC supports the argument of the petitioners that the FCC does not possess the requisite legal authority to change the policy objec-

tives of the Communications Act and to preempt state regulation of customer premise equipment.

ARGUMENT

Congress has not authorized the preemption of state ratemaking authority which has been attempted by the FCC.

In Smith v. Illinois Bell Telephone Company, 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930), this court held that the ratemaking competence of the interstate and intrastate jurisdictions must be recognized in order to reserve the appropriate division of power in our federal system of government. In Houston, E. & W. T. Railway vs. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Shreveport cases), this court held that the power of the commerce clause extended, under provisions of the Interstate

Commerce Act, to allow the Interstate Commerce Commission to regulate intrastate rates and practices. Congress reacted to this holding in its adoption of the Communications Act of 1934, by inserting restrictive provisions, including 47 U.S.C. § 152(b), 47 U.S.C. § 221(a) and 47 U.S.C. § 221(b) in order that the precedent of the Shreveport cases not be held to apply to regulation of telecommunications. The Senate manager of the bill which became the 1934 Act stated, in describing the intent of these jurisdictional reservations:

We have attempted . . . to reserve to the state commissions the control of intrastate telephone traffic [in contrast to the jurisdiction left to the states over intrastate commerce following Houston, E & W T Railway v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914)]

. . .

We attempted, in this proposed legislation, to safeguard state regulation by certain provisions to the

effect that where existing intra-state telephone business is being regulated by a state commission, the provisions of the bill shall not apply. . . . [78 Congressional Record 8823 (1934)] [Emphasis added]

Therefore, the language of the Act and associated legislative history fall far short of the unmistakable ordination of Congress for preemption which this court has held is required, Florida Avocado Growers v. Paul, 373 U.S. 132, 142 10 L. Ed. 2d 248, 83 S.Ct. 1210 (1963).

The contention, endorsed by the Court of Appeals for the District of Columbia Circuit, that state regulation of telephone equipment is subject to preemption because the equipment is capable of being used in interstate communications, is based upon a different reading of the Act than that adopted by the United States Court of Appeals for the Ninth Circuit in McDonnell Douglas Corp. vs. General Telephone Company of

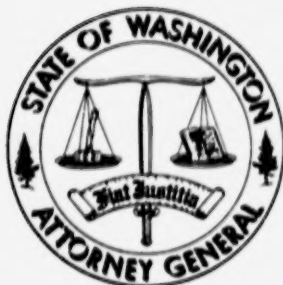
California, 594 F.2d 720 (1979), in which the court held that a particular category of service provided by a telephone company was outside of the reach of the Communications Act of 1934 because it was wholly intrastate in nature, notwithstanding the fact that it had the capability of being connected to the interstate network. The Ninth Circuit held that exposing such service to federal jurisdiction based upon this capability would be "inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services." 594 F.2d at 725.

CONCLUSION

This court should issue the requested Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. Upon such review, the court

should reverse that decision because it represents an unwarranted administrative encroachment by a federal agency into areas preserved to the states by applicable federal statutes.

Dated this 8th day of April, 1983.



Respectfully submitted,

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